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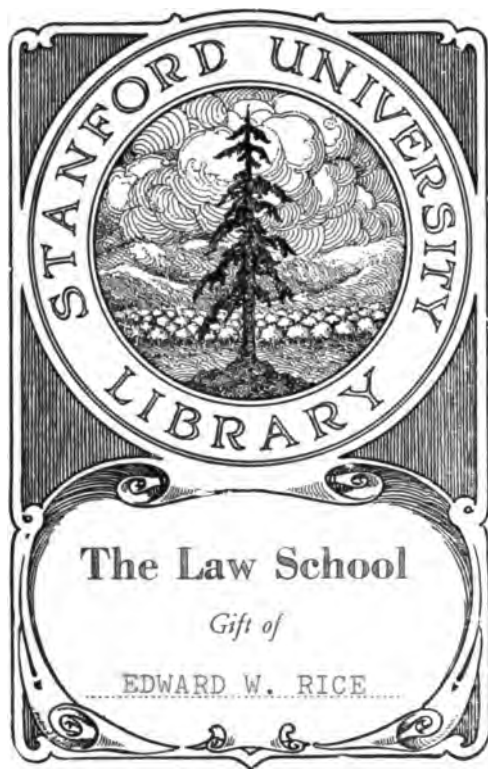
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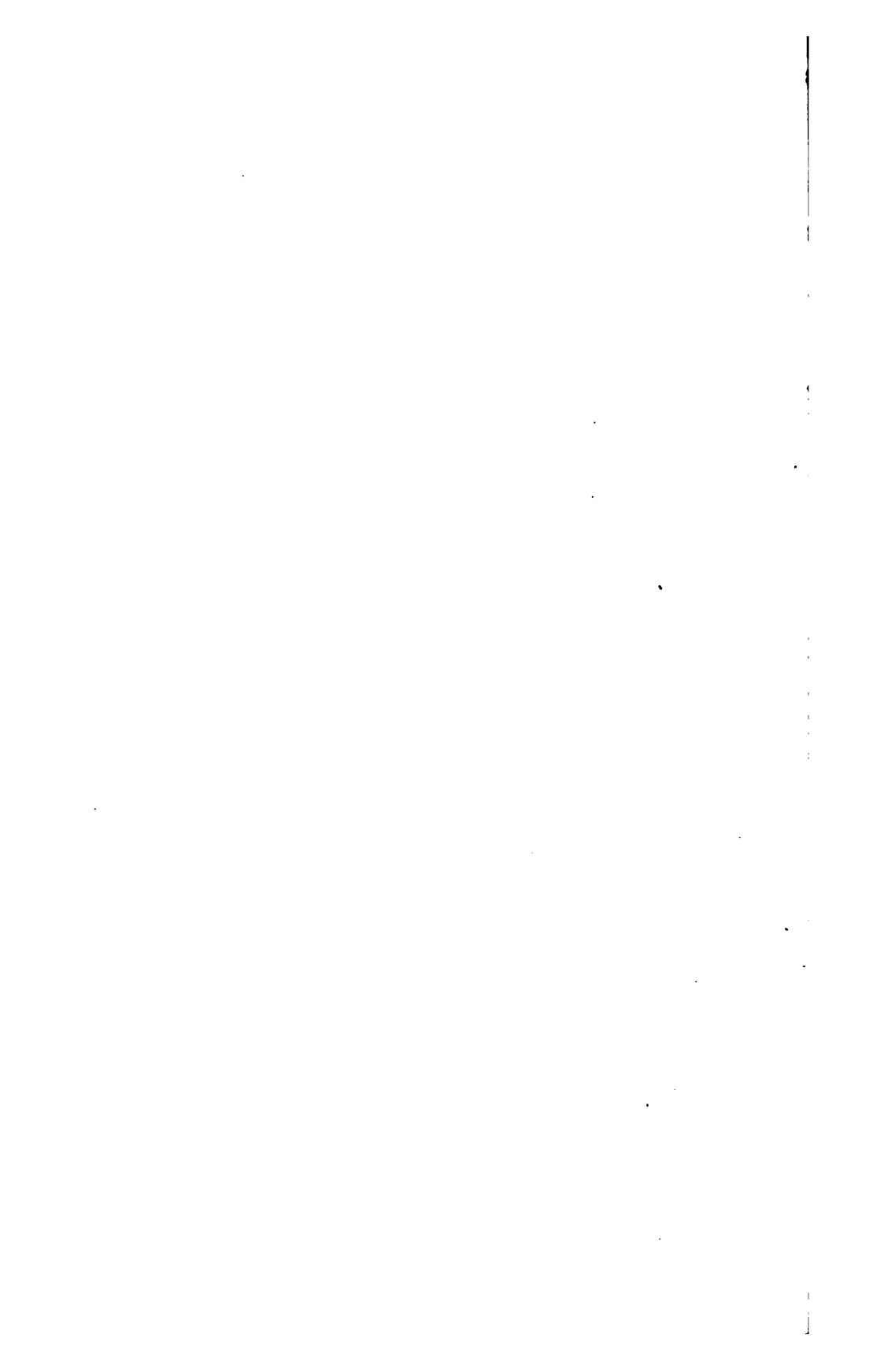
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A
PRACTICAL TREATISE
ON
THE LAW OF PERPETUITY.

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A
PRACTICAL TREATISE
ON
THE LAW OF PERPETUITY;
OR,
REMOTENESS IN LIMITATIONS OF ESTATES:
AS APPLICABLE TO THE
VARIOUS MODES OF SETTLEMENT
OF
PROPERTY, REAL AND PERSONAL,
AND IN ITS BEARING ON THE
DIFFERENT MODIFICATIONS OF OWNERSHIP
IN SUCH PROPERTY.

BY
WILLIAM DAVID LEWIS,
OF LINCOLN'S INN, ESQ.

Ergo unum debet esse omnibus propositum, ut eadem sit utilitas unius-cujusque et universorum : quam si ad se quisque rapiat, dissolvetur omnis humana consortio.—Cic. de Offic. lib. iii.

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TO
THE RIGHT HONORABLE
JOHN SINGLETON, BARON LYNTHURST,
LORD HIGH CHANCELLOR OF GREAT BRITAIN,
&c. &c. &c.

MY LORD,

If it be the legitimate and much-esteemed privilege of professional authorship to offer the productions of the pen as an humble tribute of veneration for official rank, how much is the value of this privilege enhanced, when, to the advantages of exalted station, is added the superior lustre of unrivalled genius and learning. Such, my Lord, is the satisfaction I am permitted to enjoy, in prefixing your great name to this work.

It were idle to attempt the enumeration of your claims upon public respect, since I cannot but remem-

ber, that it is the voice of the entire Profession over which you preside, that in your Lordship are united, vast talents, untiring assiduity and patience, and manners the most dignified and engaging.

I am unwilling, my Lord, to offend your delicacy, either by recounting the steps of your progress towards that summit which you long since attained, or by inquiring into the various elements of the brilliancy which now attends your occupation for the third time of the highest judicial station in the realm. Your successful pursuit of whatever the distinguished Profession, of which you have long been *facile princeps*, could give you, both of honor and emolument, was matter of surprise to none who watched your early career; and your title to each is attested by the unabated vigor of that intellect, which, while it smiles at sophistry, detects fraud, and which, laying bare every artifice, is unreservedly devoted alike to the elucidation of philosophic jurisprudence, and the unravelling of technicality and detail.

In venturing now to lay before you, an inquiry into a subject of no mean importance in the English Law, and, especially, in that branch of it, which enjoys the benefit of your Lordship's immediate superinten-

dence, I am not without apprehension of much inefficiency and many defects. But whether or not this humble treatise shall, in any small degree, assist the comprehension of that subject, I have the satisfaction of acknowledging with gratitude, that the failure will not be attributable to any unwillingness on your Lordship's part to bestow your encouragement upon the bare effort, since it is, with your kind permission, that this volume is, with profound respect, dedicated to you by,

MY LORD,

Your Lordship's very humble,

And much obliged Servant,

WILLIAM D. LEWIS.

Lincoln's Inn,

July 17th, 1843.

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P R E F A C E.

ALTHOUGH it will readily be admitted, that in a commercial country, the laws which regulate and preserve the right of free transmission of property and circulation of wealth, are of the highest importance, it must, at the same time, be conceded, that professional writers have very much overlooked this branch of English jurisprudence ; so that, up to the present time, (with one inconsiderable exception) our legal literature has supplied no treatise, having for its object, the elucidation of the doctrines of Perpetuity, as they affect the transfer and settlement of property in England. Works on other subjects have, indeed, contained incidental allusions to this topic ; and, occasionally, a single Section has been devoted to an inquiry into the effect and bearing of the laws against remoteness, with reference to the particular matter under the writer's consideration. But no formal attempt has hitherto been made to give a definite and intelligible outline of the general system,

or to explain and reconcile the various judicial decisions on the subject.

The writer of the following pages, in endeavouring to supply the deficiency above alluded to, confidently claims the indulgence of the Profession, on the ground of an utter want of that guidance which previous treatises on the same or any similar subject would have afforded. He has had to walk alone, and to cut for himself a path through a confused and extensive mass of Statutes and of cases. His aim has been to develop a general and consistent scheme, by which apparently conflicting decisions may be reconciled, and a harmonious completeness given to the entire subject. He does not flatter himself, that he has altogether succeeded: indeed, it would argue a very imperfect acquaintance with the number, extent, and complexity of the topics discussed, and a still more inadequate view of his own deficiencies, were he to claim credit for anything beyond an earnest desire to supply an acknowledged want in our professional libraries, and a laborious and unwearied effort to guard against errors, and illustrate the truth. Entertaining, as he does, the most profound veneration for our English real property law, he has been anxious to bring out the portion of it on which he has ventured to treat, in all its completeness and consistency, and to demonstrate the correctness and harmony of the principles, on which both our Parliamentary enactments and our judicial decisions have, with but few exceptions, uniformly proceeded. In aiming at

this object, the author has sometimes, with much diffidence, ventured to differ in opinion from some writers, who, immediately occupied with other topics, have made incidental allusions to the subject of this treatise, and have published *dicta* and sentiments thereon, to which he has not been able, at all times, to subscribe. It is not, indeed, matter of surprise, that writers, however learned, who merely glanced, occasionally and for a collateral purpose, at different portions of so extensive and difficult a subject, should be found inconclusive in the opinions which they entertained and expressed. It has not been without severe and anxious scrutiny of the grounds of his own conclusions, however, that the writer has in any case dissented from those of his predecessors. Whether his views are in all cases correct, it is not for him, but for the Profession, to decide ; and, whilst he awaits, with some trepidation, the decision of his judges, he derives consolation from the assurance, that he has spared neither time nor labor, in informing and maturing his judgment, ere he ventured to give publicity to his views on any branch of the subject.

If, in any point, the writer may be allowed to express an hope, that the result of his exertions will be deemed commendable, it is in that of his having striven to raise the body of law discussed in this book into a consistent, uniform, and harmonious system ; and he ventures to believe, that, in following up this design, strict truth has in no case been sacrificed to a fanciful symmetry of proportions.

One word as to the plan of the work :—The author has experienced the inconvenience of being, in this respect, almost entirely without a precedent. Hence, the arrangement and distribution of his subject, may, probably, by some critics, be thought crude and faulty. The writer has taken up the various topics, in the order which, on reflection, seemed most convenient and simple; and if, upon this point, he should unfortunately differ with his readers, he trusts, that the copious Table of Contents, at the commencement of the volume, will furnish both to practitioners and students, the readiest guidance to every point embraced by his work.

By some, perhaps, the historical account of the origin and progress of our present real property system, which occupies the first nine chapters of the work, will be excepted to, as containing nothing that has not been often and better said by established elementary writers. To novelty, indeed, in this summary, the writer makes no pretensions: but he submits to the candid reader, whether the discussion of his subject would not have been exposed to the objection of abruptness, had not the more minute inquiries of the treatise been introduced, by a glance at the basis, character, and general operation of our laws of alienation and settlement.

The full development of the writer's plan required him, in Chapter XV., to introduce a topic, the discussion of which he would, otherwise, have gladly deemed the peculiar province of Mr. *Jarman*, as well, because of the researches upon it, to which we

are already so much indebted, as of those promised in the concluding portion of the *Treatise on Wills*. Of course, it was, with much diffidence, that the writer ventured to trespass on ground pre-occupied by so distinguished an author; but he was firmly convinced, that his book would be left deficient in a most important respect, had any motive induced him to pass over unnoticed such a subject, how excellent soever the previous or forthcoming elucidations.

Of the many valuable treatises, from which the author has derived very material assistance in the composition of the following pages, he cannot omit acknowledging the greatest obligations to Mr. *Fearne's* Essay on Contingent Remainders and Executory Devises; Mr. *Hargrave's* celebrated argument in the *Thellusson* Causes; that Section of Mr. *Jarman's* work on Wills, and of his edition of Mr. *Powell's* Essay on Devises, which treats of the Rule against Perpetuities; the second volume of Mr. *Preston's* Essay on Abstracts of Title; Sir *Edward Sugden's* Treatise of Powers; and Mr. *Prior's* useful Treatise on the construction of "Issue," &c.

The writer has also been afforded valuable aid by that portion of the third Report of the Commissioners appointed to inquire in the Law of Real Property, relating to Perpetuities; but he has carefully avoided introducing into the body of his work, any discussion or mention of the legislative enactments upon that subject recommended by the Commissioners. Those desirous of considering the alterations suggested, will find them in the Appendix, No. I.

The author's plan originally embraced the subject of *accumulation* of income ; but he has since found that topic so ably and luminously disposed of by Mr. *John F. Hargrave*, in the recent "Treatise on the Thellusson Act," that he willingly relinquishes that portion of his task.

These are all the explanations which the writer deems it necessary to intrude upon the public. And he now, therefore, commends to the candour and indulgence of the Profession, this result of close and protracted investigation. Notwithstanding all his care and circumspection, errors both of sentiment and expression have, doubtless, crept into his work. Learned readers will, probably, discover mistakes which have eluded his own vigilance, and mark defects which further study might have supplied. But, those inadvertencies allowed for, which scarcely any diligence would suffice altogether to exclude, the author ventures to hope, that, in the work which is now submitted to the Profession, he will be found, in the main, correctly to have elucidated the important branch of the law under discussion, and to have contributed something, however trifling, towards supplying the deficiency so generally acknowledged.

One reward, at least, the writer has already secured during the progress of his labors,—a deeper and more familiar acquaintance with that venerable body of ancient English law, whose rules and principles he has endeavoured to develope and illustrate ; which has been for many centuries the admiration of the world ; and which happily still continues to

regulate the affairs and protect the interests of a great commercial nation. To have taken a nearer view of such a code, and to have discerned the harmony and propriety of its principles and provisions, more clearly than before, is, of itself, abundant compensation for the time and effort expended on the task ; but if, beyond this, the following pages shall be found, in any measure, to clear up the obscurities, explain the difficulties, account for the anomalies, or reconcile the apparent contradictions, which attach, more or less, to the most perfect of human institutions, the author must be abundantly satisfied with the result of his labors.

To those of his friends, who have kindly assisted in the preparation of this work for the press, the author desires to record his gratitude ; while he would also express the humble hope, that his exertions may not prove wholly unworthy the attention thus bestowed upon them.

The writer originally contemplated a much more copious Index than that appended to the work ; but having found, that his design had led to the formation of a most extensive Table of Contents, he has deemed it useless to supply an Index, embracing more than the principal heads or divisions of the subject.

*Lincoln's Inn,
Trinity Vacation, 1843.*

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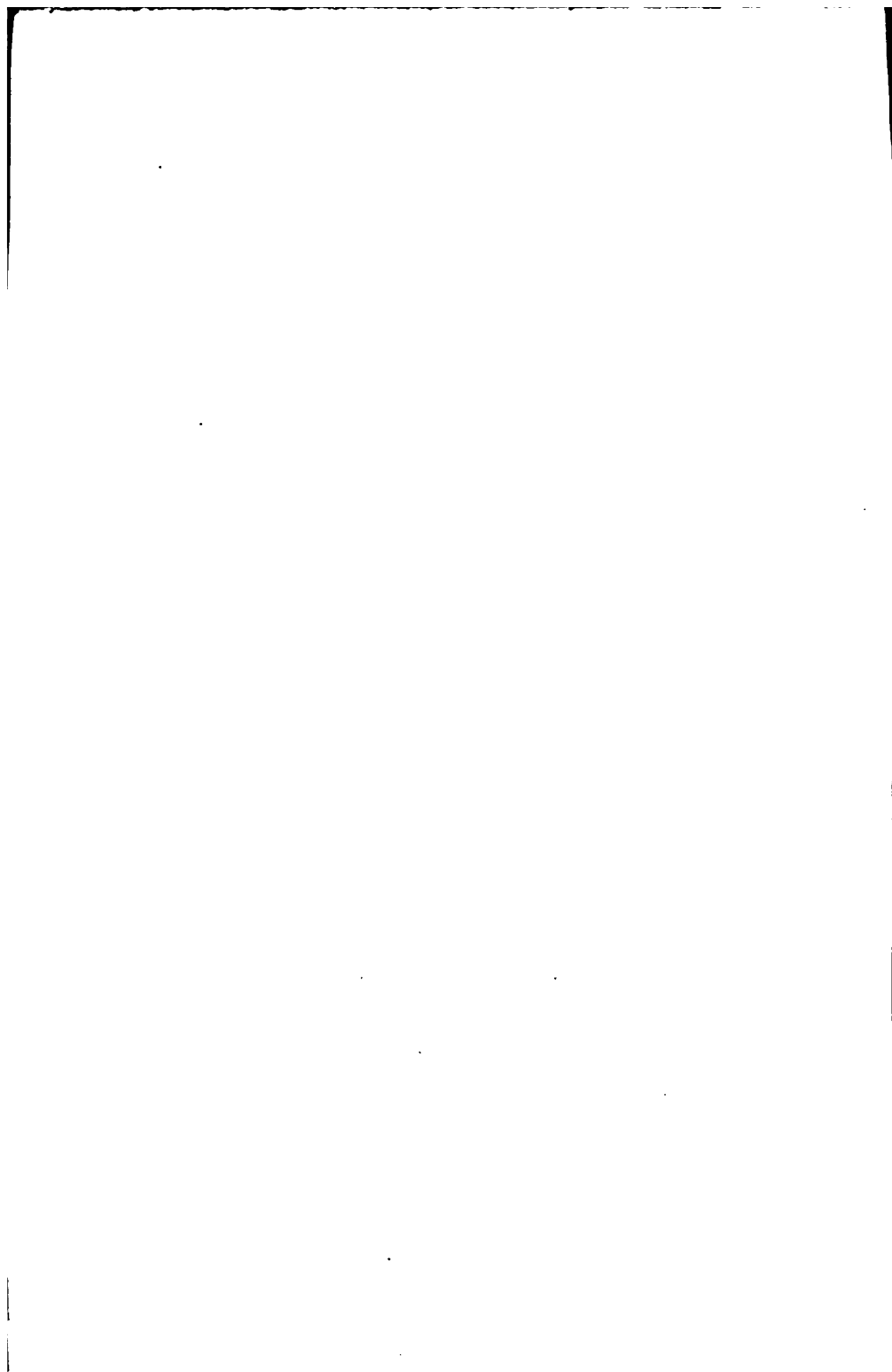
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ABBREVIATIONS.

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The following Table will explain most of the contractions which occur in the References : pointing out also the Editions used by the Author, where that is necessary.

Note.—B. R. signifies the Court of King's or Queen's Bench ; and C. B., the Court of Common Pleas.

Ab.Eq.,or,Eq.Ab.	Equity Cases abridged
Ad. & Ell. -	- Adolphus and Ellis' Reports in B. R., from 1834 to 1840.
Ambl. -	- Ambler's Reports in Chancery.
Atk. -	- Atkyns' Reports in Chancery, temp. Lord Hardwicke, from 1736 to 1754.
B. & Ad. -	- Barnewall and Adolphus' Reports in B. R., from 1830 to 1834.
B. & Ald.	- Barnewall and Alderson's Reports in B. R., from 1817 to 1822.
B. & Cress.	- Barnewall and Cresswell's Reports in B. R., from 1822 to 1830.
Bac. Abr. -	- Bacon's Abridgment of the Law.
Bac. Read. Uses, or, Bac. Uses. }	Bacon's Reading on the Statute of Uses.
Beav. -	- Beavan's Reports in the Rolls Court, from 1838 to present time.
Bing. -	- Bingham's Reports in C. B., from 1822 to 1834.
Bing. N. C.	- Bingham's New Cases in C. B., from 1834 to 1840.
Bl. Com. -	- Sir William Blackstone's Commentaries on the Laws of England : 10th edition, 1787.

Bl. Rep., or, Sir W. Bl.	- - -	{ Sir William Blackstone's Reports in B. R. and C. B., from 1746 to 1779.
Bligh	- - -	Bligh's Reports in the House of Lords, in 1819-20.
Bligh, N. S.	- - -	Bligh's Reports in the House of Lords, New Series, from 1827 to 1837.
Bos. & Pull.	- - -	Bosanquet and Puller's Reports in C. B. and Exch. Chamb., from 1796 to 1807.
Bro. Ab.	- - -	Broke's Abridgment of the Year Books, &c.
Bro. C. C.	- - -	Brown's Reports in Chancery, from 1788 to 1794.
Bro. P. C., or, Bro. Parl. Ca.	- - -	{ Brown's Reports in Parliament, from 1751 to 1800.
Brod. & Bing.	- - -	Broderip and Bingham's Reports in C. B., from 1819 to 1822.
Brownl.	- - -	Brownlow and Gouldsborough's Reports in C. B., in the reigns of Queen Elizabeth and King James I.
Bulstr.	- - -	Bulstrode's Reports in B. R., in the reigns of King James I., and Charles I.
Burr.	- - -	Burrow's Reports in B. R., from 1756 to 1772.
Burt. Elem. Comp.	- - -	{ Burton's Elementary Compendium of the Law of Real Property: 4th edition, 1837.
Ca. Temp. Talb., or, Ca. T. T.	- - -	{ Cases in Chancery in the time of Lord Talbot.
Cha. Ca.	- - -	Cases in Chancery, in the reign of Charles 2.
Ch. Rep.	- - -	Reports in Chancery in the reigns of Charles 1 and 2, James 2, William 3, and Anne.
Cl. & Fin.	- - -	Clark and Finnelly's Reports in the House of Lords, from 1832 to present time.
Co. Litt.	- - -	Coke upon Littleton.
Conv. Ev., or, Cov. Conv. Ev.	- - -	{ Coventry's Conveyancer's Evidence.
Con. & Law.	- - -	Connor and Lawson's Reports in the Court of Chancery in Ireland, temp. Lord Chancellor Sugden.
Com. Dig.	- - -	Comyn's Digest of the Laws of England.
Com. Rep.	- - -	Comyn's Reports in B. R., C. B., and Exch., in the reigns of William 3, Anne, George 1 and 2.
Cowp.	- - -	Cowper's Reports in B. R., from 1774 to 1778.
Cox	- - -	Cox's Cases in the Court of Equity from 1780 to 1796.
Cro. Eliz.	- - -	{ Croke's Reports in B. R. and C. B., in the reigns of Elizabeth, James 1, and Charles 1.
Cro. Jac.	- - -	{
Cro. Car.	- - -	{
Crompt. & Jerv.	- - -	Crompton and Jervis' Reports in Exch. and Exch. Chamb., 1830-2.
Cru. Dig.	- - -	Cruise's Digest of the Laws of England respecting Real Property: 1st edition.
Cru. Fi. and Rec.	- - -	Cruise's Fines and Recoveries: 3rd edition.
Dougl.	- - -	Douglas' Reports in B. R., 19 to 25 Geo. 3.

TABLE OF ABBREVIATIONS.

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Dow	- -	Dow's Reports in the House of Lords, 53 to 58 Geo. 3.
Dowl. & Ryl.	-	Dowling and Ryland's Reports in B. R., 2 to 8 Geo. 4.
Dr. & War.	-	Drury & Warren's Reports in Court of Chancery in Ireland, temp. Lord Chancellor Sugden.
Duke Char. Uses		Duke's Charitable Uses : Bridgman's edition.
Dy., or, Dyer	-	Dyer's Reports in the reigns of Henry 8, Edward 6, Mary, and Elisabeth.
East	- -	East's Term Reports in B. R., 41 to 53 Geo. 3.
Eden	- -	Eden's Reports in Chancery, from 1757 to 1766.
Eq. Ab.	- -	See Ab. Eq.
Eq. Ca.	- -	See Cha. Ca.
F. C. R.	- -	Fearne's Essay on the learning of Contingent Remainders and Executory Devises : 8th edition (unless otherwise expressly stated).
Fearne, Posth.		Fearne's Posthumous Works : by T. M. Shadwell.
F. Ex. Dev.	-	Fearne's Executory Devises (being the portion of the Essay on Contingent Remainder &c., relating to Executory Devises) : 4th edition, by John Joseph Powell.
Fin. Ch. Rep.	-	Finch's Chancery Reports.
Fitz. or Fitzgib.		Fitzgibbon's Reports in Chancery, B. R., C. B., and Exch., in first five years of Geo. 2.
Fitz.	- -	Fitzherbert's Abridgment.
Fonbl. Eq.	-	Fonblanque's Treatise of Equity : original edition.
Freem.	- -	Freeman's Reports in Chancery, from 1560 to 1706.
Gilb. Ten.	-	Gilbert's Law of Tenures : 3rd edition.
Gilb. Rents	-	Gilbert's Treatise on Rents : original edition.
Gilb. Uses & Tr.		Gilbert's Law of Uses and Trusts : 3rd edition, by Sir B. Sugden.
Godb.	- -	Godbolt's Reports in reigns of Elisabeth, James 1, and Charles 1.
H. Bl.	- -	H. Blackstone's Reports in C. B. and Exch., from 1788 to 1796.
Hare	- -	Hare's Reports of Cases in Chancery before Sir J. Wigram, V. C.
Hargr. Accum.		Hargrave's Treatise on the Thellusson Act.
Hargr. Co. Litt.		Hargrave's notes to Coke upon Littleton.
Hargr. Jurid. Arg.		Hargrave's Juridical Arguments and Collections.
Hargr. Law Tracts		Hargrave's Collection of Law Tracts on the Laws of England.
Hayes Conv.	-	Hayes' Introduction to Conveyancing : 3rd edition.
Hayes Inquiry, &c.		Hayes' Inquiry into limitations to heirs of the body, &c.
Hayes Principles, &c.	-	Hayes' Principles for expounding dispositions to heirs in tail, &c.
Hob., or, Hobart		Hobart's Reports in time of Eliz. and Jac. 1.
Hog.	- -	Hogan's Reports in the Rolls Court in Ireland, temp. Sir W. McMahon.

Holt	-	-	Sir J. Holt's Reports from 1688 to 1710.
Jac.	-	-	Jacob's Reports in Chancery, temp. Lord Eldon.
Jac. & W.	-	-	Jacob and Walker's Reports in Chancery, temp. Lord Eldon.
Jarm. Conv.	-	-	Jarman's Conveyancing.
Jarm. Pow. Dev.	-	-	Powell's Essay on Devises: 3rd edition, by Jarman.
Jarm. Wills	-	-	Jarman's Treatise on Wills.
Jenk. Cent.	-	-	Jenkin's Eight Centuries of Reports, from 4 Hen. 3 to 21 James 1.
Jur.	-	-	The Jurist.
Jurid. Arg.	-	-	See Hargr. Jurid. Arg.
Keb.	-	-	Keble's Reports in B. R., 12 to 30 Charles 2.
Keen	-	-	Keen's Reports of cases in Chancery before Lord Langdale, M. R.
Leon., or, Leo.	-	-	Leonard's Reports in reigns of Elizabeth and James 1.
Lev.	-	-	Levins' Reports in B. R., from 12 Charles 2 to 8 Will. 3.
Lex. Cust.	-	-	Lex Custumaria
Ley	-	-	Ley's Reports in the reigns of James 1, and Charles 1.
Ll. & Go., temp. Plunkett	}	Lloyd and Goold's Reports in Court of Chancery in Ireland, temp. Lord Chancellor Plunkett.	
Lutw.		-	Lutwyche's Reports in C. B., from 34 Charles 2 to 2 Anne.
M. & W.	-	-	Meeson and Welsby's Reports in Exch. and Exch. Chamb., from 6 Will. 4, to present time.
Madd.	-	-	Maddock's Reports in Chancery, (V. C.) 55 to 60 Geo. 3.
Madd. Chan.	-	-	Maddock's Treatise on Principles and Practice of Court of Chancery: 2nd edition.
Marsh.	-	-	Marshall's Reports in C. B., 54 to 57 Geo. 3.
Maule & Selw.	-	-	Maule and Selwyn's Reports in B. R., from 1818 to 1817.
Mer.	-	-	Merivale's Reports in Chancery, from 1815 to 1817.
Mod.	-	-	Modern Reports, from Restoration of Charles 2 to 28 Geo. 2.
Moo.	-	-	Moore's Reports in C. B., from 1817 to 1827.
Moo. & Sc.	-	-	Moore and Scott's Reports in C. B., from 1831 to 1834.
Moor.	-	-	Moore's Reports in reigns of Henry 8, Elizabeth, and James 1.
My. & Cr.	-	-	Mylne and Craig's Reports in Chancery, from 1835 to 1838.
My. & K.	-	-	Mylne and Keen's Reports in Chancery, temp. Lord Brougham and Sir J. Leach.
Noy	-	-	Noy's Reports in reigns of Elizabeth, James 1, and Charles 1.
Owen	-	-	Owen's Reports in B. R. and C. B., in reign of Elizabeth.

P. Wms.	-	-	Peere Williams' Reports in Chancery, from 1695 to 1734.
Palm.	-	-	Palmer's Reports in B. R., from 17 James 1 to 4 Charles 1.
Parl. Ca.	-	-	See Show. Parl. Ca. and Bro. Parl. Ca.
Fig. Recov., or, Fig. Rec.	-	{	Pigott's treatise of Common Recoveries: 3rd edition, by Serjeant Wilson.
Plow., or, Plowd., or, Plowd. Com.	-	{	Plowden's Commentaries or Reports in reigns of Edward 6, Mary, Philip and Mary, and Elizabeth.
Pollexf.	-	-	Pollexfen's Reports in B. R., &c., from 22 to 36 Charles 2.
Pre. Cha., or, Pr. Ch.	-	}	Precedents in Chancery, from 1689 to 1722.
Prest. Abet.	-	-	Preston's Essay on Abstracts of title: 1st edition.
Prest. Conv.	-	-	Preston's Treatise on Conveyancing: 1st edition.
Prest. Estates.	-	-	Preston's Elementary Treatise on Estates.
Q. B.	-	-	Queen's-Bench Reports, by Adolphus and Ellis, from 1840 to present time.
Ram Assets			Ram's Treatise of Assets: 1st edition.
Rand. Perp.	-	-	Randall's Essay on the Law of Perpetuity.
Raym.	-	-	Lord Raymond's Reports in B. R. and C. B., in Reigns of William 3, Anne, Geo. 1 and 2.
Re. Pr. Com. Rep.			Reports of the Commissioners on the Law of Real Property: as printed by order of Parliament.
Read. Uses	-	-	See Bac. Read. Uses.
Rep., or, Co. Rep.			Lord Coke's Reports, from 14 Eliz. to 13 Jac. 1.
Rol., or, Roll. Abr.			Rolle's Abridgment.
Roll. Rep.	-	-	Rolle's Reports in B. R., from 12 to 22 Jac 1.
Rop. Leg.	-	-	Roper's Treatise on Legacies: 2nd edition.
Russ.	-	-	Russell's Reports in Chancery, temp. Lord Eldon, 1826—1828.
Russ. & My.	-	{	Russell and Mylne's Reports in Chancery, temp. Lord Lyndhurst, Lord Brougham, and Sir John Leach.
Salk.	-	-	Salkeld's Reports in B. R., &c., from 1 William and Mary to 10 Anne.
Sand. Uses, or, Sand. Uses and Tr.	-	-	Sanders' Essay on Uses and Trusts: 4th edition.
Sandf. Entail	-	-	Sandford on the history and law of Entails in Scotland: 2nd edition.
Saund.	-	-	Saunders' Reports in B. R., in reign of Charles 2.
Sch. & L.	-	-	Schoales and Lefroy's Reports in Chancery in Ireland, temp. Lord Redesdale, 1802—1806.
Scott	-	-	Scott's Reports in C. B., from 1834 to 1840.
Scott, N. S.	-	-	Scott's New Reports in C. B., from 1840 to present time.
Scriv. Cop., or, Scriv. Copy.	-	}	Scriven's Treatise on Copyholds: 3rd edition.
Shelf. Wills	-	-	Shelford's Treatise on Wills.

Shelf. Mortm. and Char. Uses.	}	Shelford's Treatise on Mortmain and Charitable Uses.
Shep. Touchst.		Sheppard's Touchstone of Common Assurances : Preston's edition.
Show. Parl. Ca.		Showers' Cases in Parliament.
Sim. - -		Simon's Reports in Chancery, (V. C.) from 1826 to present time.
Sim. & Stu. -		Simon and Stuart's Reports in Chancery, (V. C.) 2 to 7 Geo. 4.
Smith - -		Smith's Reports in B. R., &c., 44 to 46 Geo. 3.
Stark. Evid. -		Starkie's Treatise on Evidence : 2nd edition.
Sug. Pow. -		Sugden's Treatise of Powers : 6th edition (unless otherwise expressly stated).
Sugd. Gilb. Uses and Tr. -	}	Sugden's edition of Gilbert's Treatise on Uses and Trusts.
Swanet. - -		Swanston's Reports in Chancery, 1817—1819.
T. R. - -		Term Reports, or Durnford and East's Reports in B. R., from 1785 to 1800.
Taunt. - -		Taunton's Reports in C. B., &c., from 1807 to 1819.
Turn. & Russ.		Turner and Russell's Reports in Chancery, temp. Lord Eldon, 1823—1825.
Vaugh. - -		Vaughan's Reports in C. B.
Ventr. - -		Ventris' Reports in B. R. and C. B., in time of Charles 2.
Vern. - -		Vernon's Reports in Chancery, from 1680 to 1716.
Ves. sr. - -		Vesey's (senr.) Reports in Chancery, temp. Lord Hardwicke, from 1746 to 1755.
Ves. jr., or, Ves.		Vesey's (junr.) Reports in Chancery, from 1789 to 1816.
Ves. & B. - -		Vesey and Beame's Reports in Chancery, from 1812 to 1814.
Vin. Abr., or, Viner. -	}	Viner's Abridgment of Law and Equity.
Watk. Copy. -		Watkins' Treatise on Copyholds : 4th edition.
West. - -		West's Reports in Chancery, temp. Lord Chancellor Hardwicke, from 1736 to 1739.
Willes - -		Willes' Reports in C. B., from 1737 to 1758.
Wilm. Rep. -		Wilmot's Notes of Opinions and Judgments.
Wils. - -		Wilson's Reports in B. R. and C. B., from 1749 to 1769.
Yelv. - -		Yelverton's Reports in B. R., from 44 Eliz. to 10 Jac. 1.
You. & Coll. -		Younge and Collyer's Reports in Exch. Eq., from 1834 to 1840.
You. & Coll. N. C. C. -	}	Younge and Collyer's Reports of Cases in Chancery before Sir J. L. K. Bruce, V. C.

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—— <i>v.</i> Wright	74, 120		

CORRIGENDA.

- P. 65, margin.—*For applicability read inapplicability.*
P. 78, note (a).—*For Hargr. read Butl.*
P. 185, note.—*For Gardiner v. Sheldon read Sheldon v. Gardiner.*
P. 252, note.—*For Doe d. Elvey read Doe v. Elvey.*
P. 325, line 17.—*For astuti read astute.*
P. 413, line 27.—*For authorites read authorities.*

A

PRACTICAL TREATISE

ON

THE LAW OF PERPETUITY.

INTRODUCTION.

THE right of property, or the right to exercise an absolute control over property, (to whatever extent enjoyed,) being the creature of civil society, and introduced and established by the exigencies and necessities of that society, in opposition to the primary suggestions of the law of nature, (a) it is evident that the various rights consequent on, or associated with the absolute right of property, are and ever must be regulated, in all respects, by the very same necessities which gave it birth. The right of the heir by descent, the purchaser by conveyance, and the devisee by testament, being alike the offspring of political necessity, and countenanced and established for the peace and welfare of society, it is not only proper but necessary, that the exercise and enjoyment of those rights should be subjected to such

The right of disposal of property, being the creature of political necessity, must be subject to such restrictions as are requisite for its answering the ends proposed in the institution.

(a) Puffendorf, de Offic. Hom. et Civis. lib. 1, cap. 12.—Titius.— Locke on Civ. Gov. c. 5.—Bl. Com. vol. 2, c. 1.

restrictions as will prevent their creating inconveniences and disturbances even worse than those intended to be avoided by the original departure from the law of nature. The right of every landholder, whether countless acres own him as their lord, or he be proprietor only of a cottage garden, is the creature of necessity; and the exercise of that right is properly subject to the laws which the same necessity, originating in varying times and circumstances, may impose. Now, in proportion as civilization advances, and, with it, trade and commerce, the great fountains of wealth;—in proportion also as the exigencies of mankind increase, and, with them, an infinite variety of modifications of the right of property as requisite to meet those exigencies;—in the very same proportion will the necessity for the free and easy circulation and transmission of property be manifest. If the municipal laws empower neither the transfer of property from one person to another during the lifetime of the owner, nor its posthumous alienation, then is its value to the commonwealth small indeed. Accordingly, by the laws of all states, to any considerable extent advanced in civilization, either the whole, or a definite part, of the share of every recognised possessor or occupier of the soil, is at his disposal.

The exercise of this right of property in a manner fatal to its future enjoyment militates against the desired end.

Nevertheless, this *jus disponendi*, however surely guaranteed by the laws of a country, would, in the end, serve little purpose, were it open to an individual, either in his lifetime or at his death, to exercise his right of disposal in a manner that would deprive the commonwealth for ever, or for a long period of time, of all practical benefit from the property in his possession. The political necessity that conferred on the owners of property the absolute right to dispose of the whole or a portion of it at their pleasure, would then forbid their exercise of that power, in a manner fatal to its enjoyment in all future time, or prejudicial to the general interests of society. But prejudicial the exercise of that right, assuredly, is, when the property which an individual

may have amassed by successful industry, or have acquired by fortune, thereby becomes (as it were) a stagnant possession, and, for all purposes of the commonwealth, useless. A miserly disposition, in this case, withdraws from free circulation, and, therefore, renders worse than valueless, property which, without the protection of the state and its municipal laws, could not have been obtained, or, if obtained, preserved. "Experience," says Sir *Wm. Blackstone*, "hath shewn that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained."

From the simplicity of manners and laws of some states, and the backwardness in civilization and refinement of others, the necessity of which we have last spoken is unknown. In England, however, where the antiquity of our laws and institutions is exceeded only by their complexity and infinite variety,—where the trade and commerce, which form an integral part of our national strength, demand a power of free transfer of property from man to man, co-extensive with his ever-varying exigencies,—where the habits of an ancient and wealthy aristocracy incline that class to dispose of their property, in a manner favourable to the inheritors of their dignity, but not to its free interchange and transmission,—in England thus circumstanced, and with interests and classes so directly conflicting, it is reasonable to suppose that rules jealously protecting the free circulation of property, at once in accordance with the spirit of the laws, and answering all the necessities of a commercial country, while they afford every reasonable facility for those family arrangements enjoined by the ties of nature, and not inconsistent with the welfare of society ;—it is, we repeat, reasonable to suppose, that some such rules should form an important feature in the judicial polity of the kingdom.

Nor can it be matter of surprise, if in a country such as this; where the *mobilia*, (including in that term every thing except *solum, vel quæ solo adherent*) form as much a con-

Mixed character of English resources, and variety in phases of its community, afford peculiar display to these principles.

In a commercial country, unrestricted right of

disposal of
personals, of
equal import-
ance with that
of the soil or
land.

English juris-
prudence
supplies the
provisions
found to be
antecedently
probable.

These con-
tained in the
rules against
perpetuities.

stituent part of the national wealth, as the *immobilia*; the laws should be found to evince as strict a regard for the unclogged circulation and transfer of the former, as the general condition and circumstances of the country lead us to infer they would entertain for the free interchange and alienation of the latter.

And, accordingly, on surveying the temple of English jurisprudence, we behold in it a range of columns, which, while they impart symmetry and beauty to the whole building, afford it, also, material support. In other words, the Laws of Property in England are nicely adapted for preserving harmony between the diversified elements which constitute the sources of national prosperity, at a point where they are most liable to clash, by securing the necessary freedom of commerce in the *alienation* and *pledge* of every species of property, on the one hand, and the proper and reasonable regard to private and family purposes in the *settlement* of property, on the other.

These are the important objects designed in the branch of English law, known as the *Rules against Perpetuities*;—rules which, while they are efficient for the purpose of preserving and guaranteeing the free circulation of property to the utmost reasonable extent, yet afford ample scope for that attention to personal and family exigencies, which it is neither the policy of the laws, nor the interest of society, entirely to overlook. In these rules, prohibiting, as they do, restrictions on the alienation or suspension of the possession and enjoyment of property for more than a fixed period of time, we discover that wise attention to the public interest, in its *minutest* concerns, which characterizes England's judicial code, and will ever constitute its highest praise. (b)

(b) The author has no intention to impugn the maxim, "*de minimis non curat lex*." The "*minimis*," it is conceived, refers to insignificant tech-

nicalities, provision for which is inconsistent with the majesty of the law, and calls for more subtlety than is compatible with its general simplicity.

To the practical efficiency of the Rules against Perpetuities in promoting the purposes designed in them, testimony is thus ably borne by the learned Mr. *Butler* : (c)—“The limits within which the English system of the settlement of property confines the restraints on alienation prevent the subtraction from commerce of an undue proportion of the national wealth, and leave as much of it for circulation as is sufficient to answer the wants of those who wish to purchase ; and while a perpetual entail is avoided, such an entail may be framed as will effect all those provisions which it is consistent with the limited reach of human prudence to design ; and when the entail is discharged, it most frequently happens that the rights or views of the parties interested in the property lead wholly or partially to a renewal of the entail, and thus, while individuals have the means of effecting reasonable arrangements, that succession of respectable proprietors is preserved, which conduces so much to public and private happiness.”

Testimony to their efficiency for the purpose designed.

The importance of an inquiry into the origin, progress, and present state, of the Rules against Perpetuities, being thus ascertained, it only remains to observe that they are the subjects proposed for consideration in the following pages.

We may conclude these introductory observations in the words of an elegant legal writer, who thus forcibly illustrates the necessity for the Rules against Perpetuities :—

Summary of the reasons of the Rules against Perpetuities.

“The necessity of imposing some restraint on the power of protracting the acquisition of the absolute interest in, or dominion over property, will be obvious, if we consider, for a moment, what would be the state of a community in which a considerable proportion of the land and capital was locked up. That free and active circulation of property, which is one of the springs as well as the consequences of commerce, would be obstructed ; the improvement of land

checked ; its acquisition rendered difficult ; the capital of the country gradually withdrawn from trade ; and the incentives to exertion in every branch of industry diminished. Indeed, such a state of things would be utterly inconsistent with national prosperity ; and these restrictions, which were intended by the donors to guard the objects of their bounty against the effects of their own improvidence, or originated in more exceptionable motives, would be baneful to all." (*d*)

(*d*) 1 Jarm. Wills, 219, 220.

CHAPTER I.

A PRELIMINARY INQUIRY INTO THE CHARACTERISTIC FEATURES OF THE ENGLISH SYSTEM OF DISPOSAL OF REAL PROPERTY, AS TO ITS TRANSMISSION BY DESCENT, ALIENATION, AND SETTLEMENT.

It does not seem wholly foreign to the purpose of an essay devoted to the consideration of that branch of English jurisprudence which secures the free circulation of the landed property of the realm, to preface our more minute inquiries into the history and progress of the law of settlement, (introductory to our main subject,) by a few remarks upon the general character and distinguishing features of those rights in and powers over the soil or real property of the kingdom, which are guaranteed by the laws, *scriptæ et inscriptæ*.

Sir *Wm. Blackstone* has observed, that our lands are either plainly feods, or partake very strongly of the feudal nature ; and concerning the feudal system he has remarked, that it is impossible to understand with any degree of accuracy either the civil constitution of this kingdom, or the laws which regulate its landed property, without some general acquaintance with the nature and doctrine of feods, or the feudal law. And certain it is, that English jurisprudence affords very many monuments and traces of that vast political system, in which the greater part of the Western world was, (as it were,) bound up, for centuries after the wreck of the Roman Empire ; a system which, though originally introduced by wandering barbarians, was as profound in policy, as it has proved to be extensive in results.

English law
of real property
strongly im-
pregnated with
the principles
of the feudal
system.

Glance at the
origin and
progress of the
feodal system.

Concerning the origin and progress of this system, it can be necessary here to say but little. That it was introduced soon after the final extinction of the Roman Empire in Europe, by the different nations who aided in its overthrow, is well known. That it originated in the seizure by conquering hordes of whatever they desired of the property of the conquered, in the general allotment of that property among the superior officers of the armies, and the subdivision of it, by these latter, among their inferiors, is also a fact historically ascertained. As for the rest, let Sir *Wm. Blackstone* speak:—"Allotments thus acquired naturally engaged such as accepted them to defend them, and as they all sprang from the same right of conquest, no part could subsist independent of the whole; wherefore all givers as well as receivers were mutually bound to defend each other's possessions. But as that could not effectually be done in a tumultuous irregular way, government, and to that end subordination, was necessary. Every receiver of lands or feodatory was, therefore, bound, when called upon by his benefactor or immediate lord of his feod or fee, to do all in his power to defend him. Such benefactor or lord was likewise subordinate to and under the command of his immediate benefactor or superior; and so likewise to the prince or general himself: and the several lords were also severally bound in their respective gradations, to protect the possessions they had given. Thus the feodal connection was established; a proper military subjection was naturally introduced, and an army of feodatories was always ready enlisted, and mutually prepared to muster, not only in defence of each man's own several property, but also in defence of the whole and of every part of this their newly acquired country; the prudence of which constitution was soon sufficiently visible in the strength and spirit with which they maintained their conquests."

Distinguishing The distinctive marks of this feodalism, were, first, the

destruction of *allodial* property, and the creation in its stead, of a system of *tenure*, the sovereign or first lord being entitled to the direct dominion of the land, while the tenant or vassal was invested with the *dominium utile*; secondly, that immoveable or real property only was admitted to be held in feodality, or, in other words, to be the substance of a fief; thirdly, that the relation between the chief and his vassals was purely of a military nature, and was territorial, and not considered to arise from the allegiance due from a subject to a sovereign, but from an implied obligation supposed to be annexed to the tenure of the fee.

characteristics of feudalism, in relation to the tenure of the fief, the nature of the property which formed the substance of a fief, and the connexion between lord and feodatory.

An important incident, also, of this tenure, was, that as the feudal obligation was looked upon as reciprocal, the lord could not alien or transfer his seigniority without the consent of his vassal or tenant; nor the vassal, his feod, without the license of his lord: it being equally unreasonable that the lord should extend his protection to a person to whom he had exceptions, and that the vassal should own subjection to a superior not of his own choosing. The reciprocal obligations arising from this relation were, on the part of the lord, the obligation of defending the title of his tenant, or, technically speaking, of warranty, and when subinfeodation was introduced, the further duty of acquittal, that is, of keeping the tenant free from molestation in respect of the services due to the lords paramount; and, on the part of the tenant, the obligation of giving his lord his military assistance and services in defence of the feod, when necessary.

Feodal obligations disabled lord and feodatory from aliening without mutual consent.

Respecting the time and manner of the introduction of this complex system of feodality into England, it may suffice to observe that, if not introduced, it was matured and finally established among us, by William the First and the Norman barons who shared and assisted in the Conquest, by the middle of the reign of that prince; but that it was not imposed by the Conqueror, but rather

Time and manner of introduction of feudalism into England.

nationally and freely adopted by the magnates and representatives of the realm, in the same manner as other nations of Europe had adopted it, upon the principle of self-security.

Gradual deterioration of feods.

It does not appertain to our present purpose to commence an inquiry into the mode of infeodation by corporal investiture, or of the *juramentum fidelitatis* entered into by the vassal or tenant, or of the *homagium* done by the tenant upon his investiture, or of the different kinds of services and suits to be rendered and done by the feodatory, in consideration of and as a return for his feod. Nor does it come within the scope of these preliminary remarks to inquire into the gradual progress of feods, (from being mere precarious holdings at the *will* of the lord, guided by his view of the manner in which the vassal performed his services,) to their eventual state of *substantial inheritances* descendible to the issue and collateral kindred of the feodatory. Nor do we intend to speak of the long train of burdensome and grievous imposts which attended the full establishment of the feudal system—a fruitful progeny of aids, reliefs, primer-seisins, wardships, marriages, fines for alienation, and escheats, rendering that a complicated and extensive slavery of tenure, which, (as Sir *Wm. Blackstone* says) in its primitive simplicity, was a plan of liberty equally beneficial to both lord and tenant, and prudently calculated for their mutual protection and defence. Nor need particular mention be made of that system of *scutages* or *escuages*, by which the personal attendance and services of the feodatories were frequently commuted for pecuniary assessments, and through which all the advantages, promised or real, of the feudal constitution, were destroyed, and nothing but the hardships remained. It may be well, however, to describe, in the forcible language of the authority above referred to, the effects of the degenerating influences introduced into the working of feudalism: “Instead of forming a national militia composed of barons,

knights and gentlemen, bound by their interest, their honor, and their oaths, to defend their king and country, the whole of this system of tenures now tended to nothing else but a wretched means of raising money to pay an army of occasional mercenaries. In the meantime, the families of all our nobility and gentry groaned under the intolerable burthens, which (in consequence of the fiction adopted after the Conquest) were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For besides the scutages to which they were liable in default of personal attendance, which were however assessed by themselves in Parliament, they might be called upon by the king or lord paramount for *aids*, whenever his eldest son was to be knighted, or his eldest daughter married: not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance by way of *relief* and *primer-seisin*, and if under age, of the whole of his estate during infancy. And when he came to his own after he was out of *wardship*, his woods decayed, houses fallen down, stock wasted and gone, land let forth and ploughed to be barren, to reduce him still further, he was yet to pay half a-year's profits as a fine for suing out his *livery*: and also the price or value of his *marriage*, if he refused such wife as his lord and guardian had bartered for and imposed upon him; or twice that value if he married another woman. Add to this, the untimely and expensive honor of *knighthood*, to make his poverty more completely splendid. And when by these deductions, his fortune was so shattered and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a *license of alienation*."

The chief points in connection with which it is desired to call attention to the genius of the feudal system, are those of the *alienation*, and the *inheritance* and *succession*

Branches of
feodal polity of
greatest
influence on

English system
of real pro-
perty.

of feods, as being the particular branches of feodal jurisprudence, which have intermingled themselves most intimately with our laws; and have contributed more than anything else to the formation of the English law and system of real property, and impressed it with their own distinctive features.

1. The aliena-
tion of feods.

1. We have seen that upon strict feodal principles, feods were inalienable without the license of the lord. In addition to this clog upon alienation, there was the further requisite of obtaining the concurrence of the proximate lineal heir, without which he could not be effectually deprived of the inheritance.

Gradual re-
laxation of
feodal strict-
ness in this
respect.

This feodal strictness was first relaxed by a law of King Henry the First, allowing a man to sell and dispose of lands which *he himself had purchased* or acquired, provided he did not wholly disinherit his children; and so far, therefore, the feodal pre-requisites of a license of alienation, and the consent of the eldest son, were abolished. It does not seem, however, that this law removed the ancient disability as respects the alienation of feods *descended* to the feodatory from his ancestors, although the words of the statute may well enough be confined to a saving of the rights of the issue. From *Glanville* (a writer in the reign of Henry the Second), it would appear that the power of disposing of lands was afterwards, in some way or other, considerably enlarged, and a right of alienation seems to have been in his time exercised over all lands which a person had himself *acquired*, provided they had been conveyed to him and his assigns, and also over one-fourth of all lands *descended*, without the consent of the heir.

Of the mode of
alienation by
subinfeodation.

But notwithstanding the disabilities under which feodatories were placed, in respect of the alienation of their lands, feods were ever susceptible of a particular mode of transfer, called subinfeodation, by means of which a new fief was created by the feodatory, who thereby became a mesne or middle lord, in respect of the vassals or tenants who held

under the subinfeodation. To this subinfeodation neither the license of the superior lord nor the consent of the heir of the feodatory was necessary ; but it did not destroy the relation between the lord and his tenant, or deprive the former of the right to those suits and services reserved to him on the original creation of the feod. This power of subinfeodation was so far limited, however, that the feodatory was to leave sufficient of the feod to enable him to answer the services due to his lord. This indirect power of alienation was again exercised by the subfeodatories, who carved out of their fiefs still more minute estates, to be held of themselves as inferior lords. To such an extent was this practice of subinfeodation carried, that the lords paramount began to perceive that it was the occasion of the loss to them of many of their feudal profits, by reason as well of their sometimes falling into the hands of the mesne lords, as of these being less able to render the military and other services due from them to their superiors. More certainly, therefore, to fix the limits imposed by the common law, it was provided by an article of *Magna Charta*, (9 Hen. 3, c. 32,) that no subinfeodation of part of the feod should be made, unless sufficient was left to answer the services due to the superior lords ; which sufficiency, says Sir *Wm. Blackstone*, was probably interpreted to be one-half or moiety of the land. This power of subinfeodation, however, does not appear to have extended to tenants *in capite*, or those who held immediately of the king ; in respect of whom nothing less than the whole was thought sufficient to answer the services.

Restrictions upon this right by a provision in *Magna Charta*.

Thus stood the feodatory's power of alienation until the 18th year of Edward the First, in which the famous statute of *Quia emptores terrarum* was enacted. This statute, (18 Edw. 1, st. 1, c. 1,) at once abolished the feudal liberty of subinfeodation, and, instead of it, conferred a general power of alienation of all lands held in fee simple, except those of the king's tenants *in capite*, without any license by

Power of subinfeodation abolished, and general powers of alienation conferred by stat. *Quia Emptores Terrarum*.

the lord, or consent by the heir. Its words are :—*Quod de cetero liceat unicuique libero homini terras suas seu tenementa sua, seu partem inde ad voluntatem suam vendere. Ita tamen quod feoffatus teneat terram illam seu tenementum illud, de capitali domino feodi illius, per eadem servitia et consuetudines quæ feoffator suus illa prius tenuit.* 'The king not being particularly named, the tenants *in capite* were held to be out of the statute; but the restraints on alienation by them were, in a great degree, removed by the joint effect of the statute *De Prerogativæ Regis*, 17 Edw. 2, c. 6, and the statute 1 Edw. 3, c. 12, whereby tenants *in capite* were permitted to alien, upon payment of a fine to the king. And, eventually, these fines for alienation, the last remnants of the barbarous restrictions or impositions with which feudalism had been overlaid, were swept away in the reign of Charles 2, together with every other outward badge of that military system. The statute which effected this salutary change was the 12 Charles 2, c. 24.

Extension of this power to tenants *in capite*, and substitution of fines for alienation.

Abolition of these also in reign of Charles II.

Of testamentary alienation under the feudal system.

This even less conformable to principles of feudalism than alienation *inter vivos*.

Our attention has hitherto been confined to the power of alienation in the lifetime of the feodatory which obtained under the feudal system, and its gradual disencumbrance from the shackles which that system imposed upon it. It will be proper now to consider the subject of *testamentary* alienation, in connection with the influence of feudal principles. Sir *Wm. Blackstone* well observes that, though the feudal restraint on alienation by deed vanished very early, yet this on wills continued for some centuries after, and that, owing to the want of that notoriety and public designation of the successor, which in descents is apparent to the neighbourhood, and which the simplicity of the common law always required in every transfer and acquisition of property. It seems sufficiently plain that the restraint upon the power of devising was a consequence of the introduction of the feudal system; that right having been clearly in use among our Saxon ancestors. It is also to be ascribed to the same policy which dictated the feudal doctrine of non-aliena-

tion in the feodatory's lifetime without the consent of the lord. Some, indeed, says the above learned judge, have questioned whether this restraint was not founded upon truer principles of policy, than the power of wantonly disinheriting the heir by will, and transferring the estate, through the dotage or caprice of the ancestor, from those of his blood to mere strangers. For this, it is alleged, maintained the balance of property, and prevented one man from growing too big or powerful for his neighbours; since it rarely happens that the same man is heir to many others, though by art and management he may frequently become their devisee.

But notwithstanding the feudal restrictions upon testamentary alienation, the power of devising was exercised over lands in some particular places, such as cities and boroughs, in which by special custom Saxon immunities were still preserved. A testamentary power was also allowed to be exercised over terms for years and other chattel interests in land, which, on account of their original imbecility and insignificance, were regarded as pure personalty, and, as such, were ever disposable by will.

The power sometimes exercised by custom, and over terms of years.

The statute of *Quia emptores* which removed the restrictions upon alienations *inter vivos*, not only had not the like effect in regard to testamentary alienation, but seems not even to have contemplated it, for the Latin term used in that statute does not convey the meaning of *give* or *dispose of*, generally, but the more confined signification of *sell*.

Prohibition of it not removed with that of alienation during life.

The first inroad upon feudal restrictions on this head was effected by artifice. It was one of the multifarious consequences of the introduction of the ingenious doctrine of *Uses*, (a more particular explication of which will be given in its proper place,) to render the interest of *cestui que use*, or the party beneficially entitled, deviseable, and thus, in effect and reality, to establish a power which was theoretically denied. The same ingenuity which led to the invention of *Uses* also taught the ecclesiastical chancellors and

Effect of the introduction of *Uses* in insinuating a testamentary power contrary to the rule of the Common law.

judges of the time to afford scope for that pious liberality, which, as it has been happily expressed, abounds most, when men can enjoy their possessions no longer. The mitred ministers of the law knew well how fast the wealth of the Church would flow in through the spacious door of devise, assisted by their own sedulous inculcation of the duty of bribing Heaven by a posthumous liberality. Most successful was their operation upon the superstitious fears of the timid; and the results of their skill gave a new reading to the aphorism, "Charity blesses him that gives and him that takes." The Chancery, therefore, found no difficulty in regarding the will of a person entitled to the use or beneficial interest of land, as amounting to a *declaration of use*, and by this sophistry evaded the Common law prohibition against testamentary alienation of real estates.

Temporary restoration of the former disabilities by means of the Statute of Uses.

The privilege thus surreptitiously gained, was doomed to be annihilated by the far famed *Statute of Uses*, (also hereafter more particularly noticed), which, by annexing a Common law seisin to the use, virtually destroyed all those immunities from Common law restrictions which attached themselves directly, or by consequence, to that creature of subtlety. Indeed, the "disherison of heirs by means of last wills and testaments," was one of the "subtle inventions and practices" which it was the express object of this statute to remove.

Testamentary power subsequently conferred by the Legislature.

The convulsion occasioned by this constructive operation of the Statute of Uses, and the bent of the times (which greatly favored the free alienation of property), procured the statute of 32 Hen. 8, c. 1, explained and extended by that of 34 Hen. 8, c. 5; by which the power of testamentary disposition of real estate was for the first time since the introduction of the feudal system into England, allowed by the law of the land; subject nevertheless to a restriction as to one-third of lands held in chivalry, which, by the abolition of military services in the reign of Charles the Second, ceased to exist.

But it did not

The operation of these statutes did not extend to lands

of *copyhold* tenure; but, over these lands, a testamentary power was always indirectly exercised, through the medium of *surrenders to the use of wills*; the wills operating as *declarations of the uses* of the surrenders. The necessity for these surrenders has also been recently abolished; and copyhold lands have been rendered directly devisable; with which extension of the power of testamentary disposition, all limits to its exercise (so far as respects the subject-matter of devise) have been removed.

extend to
copyholds.

This restriction
also now re-
moved.

Not, however, with the external marks or semblances of the feudal system, terminated its influence upon or connection with the judicial polity of England, as respects the alienation and transfer of real estate. Among its immediate tangible products, is to be found a rule of vital practical importance in every disposition of freehold property, which is maintained with a strict inflexibility, worthy of a feudal off-shoot. This is the well-known doctrine of law, that freehold corporeal interests cannot be created to commence *in futuro*; the original foundation for which was, the necessity that the inheritance should always be full and presently represented by a tenant, against whom the lord might come for his rents, suits, and services. Another proper result of feudalism in connection with the transfer of freehold property, was the general (or even, at first, universal) mode of alienation by livery of seisin, or corporal investiture of the land, in an open and public manner. This served a double purpose; the information of the lord as to who was responsible for the feudal fruits of tenure, and the apprising persons, by the notorious change of ownership, against whom their writs were to be brought. It is true, this mode of alienation is now seldom resorted to; but the absolute necessity for livery of seisin to the validity of a feoffment, and the superior force of that assurance to all others, when so accompanied, render this product of the feudal system of more than historical or theoretical importance. A further consequence

Some of the
practical
effects of feudal
principles upon
the law of
alienation.

of feudal principles was for some time exemplified in the constant practice of attornment by tenants, on a transfer of the reversion to which their rents and services were incident; a practice since rendered unnecessary through legislative interposition. The necessity for words of limitation in conveyances at common law may, likewise, be considered to have originated under feudal auspices; the presumption, apart from positive law, being, that a simple declaration of intention to change the ownership in property should pass the whole interest in that property; and feods not having been originally descendible, but having become so only by express gift contained in appended words of inheritance.

Universal rule
of tenure,
feodal.

Thus much for the alienation of feods. We may here, however, remark as respects the *possession* of real estate, and the rights and liabilities consequent upon it, that the first and foremost principle of feudalism is the basis of the whole superstructure of the English law of real property at this hour, as certainly as when it was first imported by the Conqueror and his Norman barons, or their predecessors in the establishment of feudalism: the principle, that is, that the monarch is the original proprietor of all the lands in the kingdom; and that they are, therefore, held either mediately or immediately of the Crown. To the force and operation of this rule of tenure, our doctrine of escheat (to mention but one instance) bears practical attestation.

2. Of the
rules of inhe-
ritance and
succession un-
der the feodal
law.

2. We now pass on to consider our *rules of inheritance and succession*, and our *canons of descent*, which (notwithstanding their mutilation in many respects by modern and ill-digested enactments) are living witnesses to the genius and fundamental principles of a system, which the independence and conceit of new-born theories have been apt to stigmatize as altogether rude and uncivilized. Nor do they bear witness to the system or its principles alone, but testify also of its wisdom, and its suitableness, no less to the

purposes of a commercial commonwealth, than to the union and defence of a military people. To form a clear conception of the extent to which the maxims and principles of the feudal law in the regulation of the rights of property have contributed to the form and pressure of our own, it will only be necessary to bear in mind the striking contrast presented by the former to the doctrines and rules of *inheritance* and *succession* of the Roman or civil law; that law being the only other distinct and systematic body of jurisprudence upon the subject (if we except, perhaps, the Code Napoleon) known to the civilized world.

Thus, (e) in the Roman law, the distinction between real and personal property, except in the term of prescription, is seldom discoverable; but, in the feudal law, the legal incidents and qualities of the two kinds of property are entirely dissimilar. The Roman law of *inheritance* embraces both kinds of property equally; the feudal law of inheritance is, most strictly, confined to real property, and, as Mr. *Butler* has said, almost turns with disdain from all property of the personal kind. By the Roman law, the heir was a person instituted by the proprietor himself, or, in default of such institution, appointed by the law, to succeed both to his real and personal property, and to all his rights and obligations. In the feudal law, he is a person related in blood to the ancestor; and, in consequence of that relationship, entitled, either merely by act of law, or by the concurrent effect of law and the charter of investiture, to succeed, at the ancestor's decease, to his real or immoveable property, not given away from him by will. In the civil law, he was considered as representing the person of the deceased; and, in consequence of that supposed representation, the law cast on him the property and rights of the deceased, and fixed on him all the de-

Their peculiar features as contrasted with those of the civil law.

(e) The writer has to acknowledge his obligations to Mr. *Butler*, for the brief outline, here attempted, of the

distinctive features of the two systems alluded to. See note to Co. Litt., and the *Hors Juridicæ Subsecivæ*.

ceased's charges and obligations. Thus, by a fiction of the law, the person of the ancestor was continued in the heir, so that, in all religious, moral, and civil rights and obligations, the heir, in the language of the Roman lawyers, was *eadem persona cum defuncto*. In the feudal system, he succeeded to the real property only of the ancestor; and this, not under any supposed representation to him, or in consequence of any supposed continuation of his person, but as related to him in blood, and, in consequence of that relationship, as a person designated by the original feudal contract, to succeed to the fief.

Again, the Roman heir claimed, as such, all from the person last possessed, and nothing from the original donor: the feudal heir claimed, as such, all from the donor, and nothing from the person last possessed.

The same difference in those laws is also observable with respect to the order of *succession*. By the Roman law, on the decease of an intestate, the descendants, of whatever degree, were called to the succession, in exclusion of all other relations, whether ascendants or collaterals, and without regard to primogeniture or preference of sex. Where the intestate left no descendants, such ascendants as were nearest in degree, male or female, paternal or maternal, succeeded to his estate, in exclusion of remote heirs, and without any regard to representation; but with this exception: that where the deceased left brothers and sisters of the whole blood, besides ascendants, all succeeded in equal portions *in capita*; and here, if, besides ascendants, the deceased left brothers' and sisters' children of the whole blood, the children succeeded to their parents' share, by representation *in stirpes*. Where the intestate left no descendants and no ascendants, the law called the collaterals to the succession, giving a preference to the whole blood. In default of a legal heir, the estate became a *res caduca*, and the *fiscus*, or exchequer, succeeded. Such appears to be the general outline of the Roman law respecting succession. The feudal regulations respecting successions

differed from it in almost every respect. Originally, fiefs were granted to be held at the will of the donor, and were, therefore, resumable at his pleasure; then they were granted for a year certain; then, for the life of the grantee; then, to such of the sons of the grantee as the donor should appoint. Then all the sons, and in default of sons, the grandsons, were called to the succession of the fiefs: in process of time, it was open to the fourth, fifth, sixth, and seventh generations, and afterwards to all the male descendants, claiming through males, of the first grantee, and at last was suffered to diverge generally to collaterals. But this, as to such collaterals as were not lineal heirs of the first donee, was effected through the medium of a fiction completely and peculiarly feudal:—Where a person took by descent, his brothers, though in the collateral line of relationship to him, were in the direct course of lineal descent from the ancestor. In proportion as the descent from the ancestor was removed, the number of persons thus claiming collaterally from the last taker, and lineally descended from the first, was proportionably multiplied. In the course of time, the first-taking ancestor was forgotten, and then, it was presumed, that all who could claim collaterally from the person last in the seisin of the fee, were of the blood of the original donee. On this ground, in later times, when, upon the grant of a fief, it was intended that on failure of lineal heirs, the fief should diverge to the collateral line, it was granted to be held with the original incidents and properties with which the donee would have held it, had it vested in him by descent, in a line of transmission from a distinct and forgotten ancestor; and among them, that of transmissibility to collaterals. In technical language, this was the grant of a fief, *novum ut antiquum*. But the most striking point of difference between the Roman and the feudal course of succession, is the prerogative allowed by the latter to primogeniture. To the eldest son, the Roman law showed no preference: wherever the feudal polity has been established,

he has been allowed several important prerogatives. In England, primogeniture obtained in military fiefs, as early as the reign of William the Conqueror, but with this qualification, that where the father had several fiefs, the *primum patris feudum* only, belonged to the eldest son. In the reign of Henry the Second, primogeniture prevailed absolutely in military fiefs, and, in the reign of Henry the Third, or soon afterwards, the same absolute right to the succession by primogeniture obtained in socage lands. In all countries where the feod has been established, a marked distinction in the order of succession has, in direct opposition to every principle and practice of the Roman law, been shewn to primogeniture.

Another striking point of difference between the Roman and the feudal polity, is the contrast between the *absolute dominion over the inheritance* with which the Roman law invested the heir, and the numerous and intricate fetters with which the feudal jurisprudence (of England, particularly,) has permitted it to be bound. The Roman law (it has been already stated) permitted a person to appoint his heir, and invested him with all the rights, and imposed upon him all the obligations, of the deceased. This gave rise to the vulgar, the pupillar, and the quasipupillar substitutions. The vulgar substitution was where the testator appointed one to be his heir, and if he refused, substituted some other person. These conditional substitutions might be extended to any number of heirs. When they were made, the heirs instituted under them were called in succession to accept or refuse the inheritance. When once an heir accepted the inheritance, it vested in him absolutely, and all subsequent substitutions entirely failed. The pupillar substitution was where a father substituted an heir to his children, under his power of disposing of his own estate and theirs, in case the child refused to accept the inheritance, or died before the age of puberty. The quasipupillar substitution, was where the children past puberty,

being unable themselves, the father, in imitation of the pupillar substitution, made a testament for them. In all these cases it is evident the dominion and substance of the inheritance were preserved entire and unqualified. In two instances, and in two only, the Roman law admitted an exception to their integrity. The first was in the case of an usufruct; where a right was given to one person, to use and enjoy the profits of a thing belonging to another. The second was the case of a *fidei commissum*, when the inheritance was given, in whole or in part, to an heir, in trust that he should dispose of it to another. But neither of these devices suspended the absolute vesting of the inheritance. An usufruct could not be extended beyond the life of the usufructuary. The *fidei-commissarius* (the person beneficially interested in the inheritance) could compel from the *hæres fiduciarius* (the trustee) a transfer of the inheritance immediately on the accruer of his right. Thus the property and dominion of the inheritance absolutely vested in him in equity, with an immediate right to compel a transfer of it. In this manner, by the Roman law, the heir succeeded, in every case, to the absolute property of the inheritance, and to all the rights and obligations of the ancestor. The alterations occasioned by the introduction of a fidei-commissarial substitution are, however, to be considered as a departure from the genuine spirit of the Roman law, in the doctrines respecting inheritances. From that spirit nothing could be more different, with respect to the tenure and modifications of property, than the regulations of the feudal law. According to these, the heir was a nominee in the original grant: he took every thing from the grantor; nothing from the ancestor. The consequence was, that while the absolute or ultimate ownership was supposed to reside in the lord, the ancestor and the heirs took equally, as a succession of usufructuaries, each of whom, during his life enjoyed the beneficial, but none of whom possessed or could lawfully dispose of, the direct or absolute

dominion of the property. Thus, while by the Roman law, property was vested in the possessor solely and absolutely, every species of feudal property was necessarily subject to the three distinct and clashing, though concurrent rights, of the lord, the tenant, and the heir.

Extent in which the contrast between the feudal system and the civil law, as to the rules of inheritance and succession, is applicable to the English system of real property.

It must not, of course, be considered that all that is predicated of the feudal system, or its maxims and rules, is equally applicable to English jurisprudence in relation to the succession and inheritance of, and power over, real property. Respect is to be had to the many modifications of feudal strictness (as, for example, the subjecting lands to the satisfaction of the deceased owner's debts, of whatever class,) which the exigencies of commerce, and the demands of an increased civilization, have rendered necessary. But notwithstanding the due allowance to be made for these considerations, it may, nevertheless, be asserted that the contrast between the doctrines and rules of the feudal system and the Roman or civil law, above given, unambiguously testifies to the former as the source, whence the rights of property, as they obtain in England, are derived, and to which their distinctive features are to be traced.

Specification of those portions of the English system of real property attributable to feudal principles, with notice of other portions of a similar character recently abrogated.

If lands have been rendered liable to the debts, whether specialty or simple contract, of deceased owners, in the hands of their devisees or heirs; if the rule which preferred the elder title by descent, when the heir was also express devisee or grantee of his ancestor, has been abolished: if lineal ancestors and semi-kindred or the half-blood have been invested with heritable capacity; if the rule which prevented a person attainted from transmitting inheritable blood to his descendants has been set aside, so as to admit of descents being traced through such a person; (though the impeding descent, by the attainder of a person through whom it must be traced, was rather a refinement upon the feudal system, than of its essence, or a property belonging to it;) if the doctrine *seisina facit stipitem*, or the rule that actual seisin

in an ancestor was necessary to his becoming a stock or root of descent, has been exploded; if, in all these respects, feudal maxims have been made to yield to modern convenience, or to a more questionable policy, there are still very many feudal remnants discoverable in our laws of property, (and they of no mean importance,) which have escaped modern innovations. To the influence of the feudal system, testimony is still borne by our *laws of inheritance*, in the preference of males among persons of equal degree; in the rule of primogeniture, amongst males; in the rule of representative primogeniture, as opposed to proximity of blood; in the equal succession among females; in the succession *in stirpes*; in the exclusion of one of the lines of heirs *ex parte maternæ* or *ex parte paternæ*, (as the case may be,) in case of a course of descent in the other of such lines; in the preference of male stocks of descent; in the rule of representative dignity or worthiness of blood, as opposed to proximity of kindred; in the exclusion of illegitimate offspring from all rights of inheritance; and in the deprivation of aliens (until denization or naturalization) of all power of acquiring property, either by inheritance or purchase, (although, perhaps, this rule is not, in all respects, *proper* to feudalism): by our *laws of limitation and settlement of estates*, in the superior respect paid to the title of the heir, and the general *primæ facie* presumption in its favour; in the rule not allowing an heir to take by purchase where there is a prior limitation to his ancestor; in the rule that freehold estates cannot be created to commence *in futuro*; and that contingent remainders must vest *eo instanti* of the determination of the particular estate: by the *laws* which entitle the crown by *escheat and forfeiture*, on extinction or corruption of blood of the person last seised: (though the laws of forfeiture are, perhaps, more properly, independent of feudal origin;) and by the wholly dissimilar nature of the laws which regulate the distribution of and succession to the *two classes* or *primary divisions of property*, one or

other of which embraces every thing capable of ownership; namely, real and personal estate, and the principles which appertain to each. (f)

(f) The Commissioners on the law of real property, thus remark on the influence of the feudal system upon the English laws of property. "Although *tenure*, which was introduced for the military defence of the kingdom, has long survived its principal object, its consequences so deeply and extensively pervade the whole system of our law of real property, that the abolition of it would be an innovation too dangerous to be prudently hazarded. The necessity would immediately arise, of providing, by positive enactments, for all the rules deduced from tenure, which it is intended to preserve. Some of these, notwithstanding the greatest care, would probably escape attention; many questions would arise upon the meaning of the terms in which the existing laws would be declared; and all the dangers and evils of codification would be encountered without its advantages."—Third Report, p. 4. The just sentiments contained in the following extract from the examination of the late Mr. Justice *Tauxton* (then at the bar,) are happily expressed.

"I consider the variety of *tenures*, in the narrow extent in which they exist, as a beauty and not as a blemish. They illustrate the antiquities, and confirm the history of the country. They bring home to our apprehension, ancient manners and customs which no longer exist, and set before our eyes, a faint but interesting picture of feudal relations. All this may be prejudice, but I own I should be sorry to see all these venerable remains sacrificed to a dry and barren uniformity." See First Report, p. 100. It is a fact, worthy of notice, that of twenty-eight lawyers, who were personally examined by, or returned their opinions to the Commissioners, on the question of the retention of the principle of *tenure* in our laws of real property, as contradistinguished from a system of allodial ownership, twenty-five considered it advantageous; and only the remaining three were favourable to its rejection. Among the former are to be found the names of *Butler* and *Bell*, and most of the eminent conveyancers of the present day.

CHAPTER II.

OF THE EARLY MODES OF SETTLEMENT AND ENTAIL OF REAL PROPERTY.

SECTION I.

Of property of Freehold Tenure, by means of Conditional Fees at Common law, and Estates tail under the Statute De donis conditionalibus.

THE law of England though now abhorring a perpetuity, and refusing validity to any disposition, either testamentary or by instrument *inter vivos*, in any degree tending to it, has not always evinced the same regard for the free circulation of property, and the interests of commerce. In the times when feudalism reigned, and its many and barbarous concomitants all served to aggrandize the wealthy baron, and reduce the fief-holder to a slavery of tenure, and, therefore, a slavery of life and action,—when the former was the legislator enacting laws for the obedience of the latter,—in such times it can be no matter of surprise if we find a system of devolution of property sanctioned and established, the proper and ultimate effect of which would be national poverty, and the loss of all national vigour and enterprise. Such a system was that originated by the statute of Westminster 2, in the thirteenth year of Edward the First, commonly called the statute *De donis conditionalibus*.

Preliminary remarks.

We have seen that under the feudal polity, as it stood in its original simplicity, where land was granted to a man and his heirs, the lord was entitled to the services of his tenant

Notice of feudal disabilities in respect to alienation and settlement.

and to the reverter of the land, if the tenant died without heirs; and that to the tenant was secured the actual enjoyment of the land, and its warranty and acquittal by the lord; whilst the heir was entitled to the inheritance on the decease of the tenant. The heir, however, derived his title under the terms of the grant, and was, therefore, considered as claiming above, not under, his ancestor. Thus, land was at that time, subject to the three distinct rights of the lord, the tenant, and the heir; and though the lord and tenant might join in the disposition of the inheritance, yet the concurrence of the heir in such disposition not being to be had, (as in the view of the law the heir did not exist in the lifetime of the ancestor, and his concurrence, therefore, could not be had,) it followed that any disposition by the former parties was invalid, and hence, under these feudal restrictions, land was wholly inalienable, and could not be modified into any form of settlement. (g)

Dower and curtesy the only provision claimable against the lord, and heir.

The feudal incidents of Dower and Curtesy were attached by law to estates of inheritance, and were the only provisions that could be claimed against the lord or the heir.

We have also seen that by degrees, the right of the lord and the heir so far as they restrained the tenant's alienation of the land, ceased to be considered.

Acquisition of a general power of alienation introduced conditional fees.

Their nature and operation.

This general power of alienation introduced limitations called *conditional fees*; one species of which was formed by a grant of land to *a person and the heirs of his body*. This mode of limitation operated as a settlement of the land, so far as that until the donee had issue inheritable under it, he could not alien nor charge the land; but, after he had issue, the condition was supposed to be performed, and he might dispose of the land at his pleasure: if he made no such disposition, the land descended to the heirs of the body of the grantee, and on failure of such heirs, it reverted to the lord. "This," says Mr. Butler, "was the first attempt in

(g) Of course, an expectant heir might concur in a disposition of the inheritance, and would be bound in

the event of his actually succeeding. *Vide, supra*, p. 12.

our law, at a settlement of real property." The distinctive feature of this conditional fee, was, it will be perceived, its alienability, after the grantee had issue, by himself and every person who came into possession of the land under the grant; which deprived the heir and the donor of all security for the devolution of the land on them.

The inclination of the *Common law*, therefore, after the power of alienation was established, was favourable to the free disposal of property; because, under its construction of the gift in question, it was, obviously, impossible that the property could remain inalienable for a longer period than the life of the grantee; the birth of issue in his lifetime determining the condition, or his death without issue giving possession to the right of reverter remaining in the donor.

Inclination of the common law favourable to the free alienation of property, proved by its construction of these gifts.

This state of the law, however, suited not the ambitious schemes of the all-powerful nobles of the realm. Their dignity required support, and their power was commensurate only with their acres, and that support and those possessions could not be guaranteed but by the perpetual transmission of their estates in the line in which their titles descended. Moreover, they desired perpetually to free their estates from liability to forfeiture for treason; an object which could be secured by the creation of a perpetual entail; by analogy to the case of fees conditional at the Common law, which were not forfeitable for treason, before issue born, longer than for the life of the donee.

Reasons of proprietors desiring a construction of such gifts which would preserve the property for their families or descendants.

These objects were incompatible with the rules of the Common law, by which the fee simple became absolute, and at the disposal of the donee, the instant any issue was born.

Resort was had, therefore, to the Legislative power then wielded by the very persons seeking this alteration: and the result was, the statute Westm. 2, 13 Edw. 1, c. 1, which enacted, that "concerning lands given upon condition, namely, where any giveth his land to a man and his wife and to the heirs begotten of the bodies of the man and his wife, with condition expressed that, if the man and his wife

Legislative effect given to their desires by statute de donis conditionalibus, creating estates tail.

die without heirs of their bodies between them begotten, the land shall revert to the giver or his heirs ; also where one giveth lands in free marriage, which gift hath a condition annexed, though not expressed in the deed, that if the husband and wife die without heirs of their bodies, the land shall revert to the giver or his heirs ; also where one giveth land to another, and to the heirs of his body issuing ; the will of the giver according to the form in the deed of gift shall be observed ; so that they to whom the land was given under such condition shall have no power to alien the land, but it shall remain to their issue after their death, or shall revert to the giver or his heirs if issue fail ; neither shall the second husband of any such woman have anything in the land so given, after the death of his wife, by the law of England, nor shall the issue of the second husband succeed in the inheritance ; but immediately after the death of the husband and wife to whom the land was given, it shall return to their issue, or to the giver or to his heir." Thus, under the plausible pretences of observing the will of the donor, and favouring the interests of the issue, was raised by the Legislature the "mighty fabric" of perpetual entail—mighty in its originators, mighty in the vast extent of territory ultimately brought within its grasp, and mighty in its consequences.

That this enactment should have been made in the reign of a Prince, whose generally wise and wholesome laws have conferred on him the title of the English Justinian, may, at first sight, seem a matter of surprise ; but the solution of the difficulty is to be found in that extraordinary influence exerted by the great barons in his and in the previous reigns, over both crown and people, of which abundant evidence is afforded in the page of history.

Probability of this enactment proving unwelcome to the different classes of the community.

It was obviously impossible, however, that a law conceived in a spirit so dangerous, and of a tendency so hurtful, could always continue entirely acceptable even to those by whom it was originated and fostered. Restricted in effect by the

statute *de donis* to the enjoyment of a mere life estate in their lands, and deprived of the power of alienation of any greater interest, these forgers of their own fetters would soon find their possessions, though of vast extent, comparatively worthless, and themselves unable to meet the lavish expenditure incurred in those wars and civil commotions, wherein, by the imprudence of some of their sovereigns, and the warlike tempers of others, they were necessarily and frequently involved. As the nobles would, in this respect, desire the removal of the statutory restrictions to the complete enjoyment of what they already possessed, so the advancement of commerce would lead the wealthy merchant and trader to seek the abrogation of a law, operating as a partial prohibition to their acquisition of that kind of property, which at once adds importance to character, and gives permanency and stability to the results of successful industry. Nor would the judges of the common law be insensible to the poisonous influence of this wide-spreading upas tree, upon the social health and vigour and life of the nation. (h)

(h) "At Common law, all estates were fee simple, absolute or conditional, which created a wonderful quiet and repose to the public; but when this family-law was introduced, and these fettered inheritances established, it is not to be imagined what suits, troubles, and disputes, they created, as indeed it always happens when the grounds of the ancient common laws of this kingdom are altered. And the reason is obvious, for the common law of England having its force from immemorial custom, and, as my Lord Coke observes, being refined by the experience of many ages, its goodness is formed by its use; but when this excellent institution is altered by a positive law, though the change has a gay outside, yet time

shows the inconvenience of the alteration, and the Legislature having only a present conveniency in view, the new law, when used, manifests that what was intended profitable, proves often destructive; and so it fell out in making the statute *de donis*, which created estates tail, turning all those estates which were fee simple at Common law into those entailed estates, which being of an amphibious nature, and participating so much of a fee as to be inheritance, and yet tenant in tail in some respects, having only an estate for life, this odd mixture created infinite difficulties not foreseen, but experimentally found to be very troublesome to the quiet of the state." *Fig. Recov.* pp. 5, 6.

Failure of attempts to procure a repeal of the statute.

Notwithstanding, however, the concurrence of these interests in favor of a Parliamentary repeal of the obnoxious statute, such a repeal was found impossible. The Commons, indeed, frequently endeavoured to obtain legislative provisions favorable to alienation by tenants in tail, but all attempts to bring the second Estate of the realm to consent to a repeal of the statute *De donis*, were fruitless.

Reason of this.

The exemption of estates tail from forfeiture for treason, fully compensated, in the minds of the nobles, for all the other inconveniences attending them; an exemption, of the full value of which, during the civil contests then waging, when each party, in its turn victorious, visited its opponents with wholesale attain, we can form no adequate estimate.

All these things paved the way for a gradual evasion of the statute, by the constituted administrators of the law; an evasion which, it has been well said, "ingenuity fabricated, and necessity adopted."

Statute *de donis* introduced settlements of real property by way of estates tail and remainders.

We are to observe, in fine of this part of our subject, that the statute *De donis* gave rise to the settlement of real property, by way of *estates tail* and *remainders*; as the estate created by the statute did not, like the conditional fee, at common law, embrace the whole fee, but was a new kind of inheritance, admitting of further limitations after or expectant upon it.

SECTION II.

Of Settlements of property of Copyhold Tenure, by means of Conditional Fees and Entails, under Customs.

It remains for us to say somewhat respecting conditional fees and entails in lands of copyhold tenure.

The question of the applicability of the

It has been matter of much learned controversy whether the statute *De donis conditionalibus* can be said to extend

to copyhold lands, so as to make them the subjects of a strict entail, resembling that which we have seen was introduced by that statute with respect to freehold estates.

statute *de donis* to copyholds.

Some have considered that by the joint co-operation of a custom of entailing and the Statute *De donis*, an estate may be created in copyholds, having all the qualities of an estate-tail; (i) others have maintained that the statute neither had nor could have had any connection whatever with lands of copyhold tenure; (k) while others, again, have thought that copyholds were within the Statute of Entails, and may be entailed as well as other lands. (l)

The different opinions entertained thereon.

The general opinion at the present day is, that the Statute *De donis* does not extend to copyhold lands, and that it has neither an indirect nor any other influence in favor of the creation of estates-tail in such lands. It seems to be generally agreed, that before the statute, limitations of copyhold lands to a man and the heirs of his body were common, and that such grants generally passed a fee-simple conditional, resembling in its characteristics the estate which was created under a similar limitation in freehold lands. With respect to gifts of this class since the statute, the better opinion seems to be, that, unless there is a custom to entail in the manor within which the lands are situate, they pass a conditional fee of the same kind. There may, however, be a custom in manors to create estates-tail, and such a custom, it should also seem, was not wholly unknown before the statute *De donis*.

No entail in copyholds except by custom.

But the mere fact that lands have anciently and usually been granted by copy of court roll to persons and the heirs of their bodies will not, of itself, prove a custom of entailing copyholds, for such grants might have created estates in fee-conditional at Common law. To prove that an entail

What necessary to prove a custom to entail.

(i) Co. Litt. 60. Gilb. Ten. 169.

(l) Lord Hale, in 3 Lev. 327. Pig.

(k) 1 Scriv. Cop. 68, et seq. 1 Recov. 101. .
Prest. Conv. 153.

may be created, there must have been a custom allowing a remainder to be limited over after such an estate, (such a remainder not being reconcileable with a fee-conditional,) or empowering the copyholder to alienate before issue born, (which he could not do in respect of a fee-conditional,) or the issue must have recovered the lands in writs of formedon in the descender.

When an estate tail, and when a conditional fee.

To use the words of a recent writer upon this subject, (m) the immemorial existence of those privileges, which, under a limitation to a man and the heirs of his body, create a constructive estate-tail, is very common, and has frequently availed in questions upon copyhold titles; so that where a remainder may be grafted on the limitation to the heirs of the body, which remainder is inconsistent with a fee-conditional, for no remainder could be limited after such an estate; or where the tenant is permitted by the custom to claim even before issue born, in prejudice to the right of reverter, an estate limited to a man and the heirs of his body, is in the nature of a fee-tail at Common law, since the Statute *De donis*; and where from a more jealous preservation of the right of reverter, such remainders are not allowed, or the power of alienation originates with the birth of issue, the estate is in the nature of a fee-conditional.

A custom to entail not necessarily existing in all manors admitting of the creation of estates in fee-simple.

In opposition to these views, another learned writer (n) has maintained, that the power of creating entails necessarily exists in all manors where a grant in fee-simple is allowed; but to this it has been judiciously answered, (o) that although a custom to create a fee-simple will warrant a grant to a person and the heirs of his body, yet, that such a limitation would be a fee-conditional, unless the privileges of an estate-tail at common law have grown out of the custom of the manor under an immemorial usage.

(m) 1 Scriv. Cop. 69.

(o) 1 Scriv. Cop. 70.

(n) 1 Watk. Cop. 153.

With respect to the creation of entails in equitable estates, the rule is, *æquitas sequitur legem*, and, therefore, wherever the legal estate does not admit of an entail at law, an entail in equity is equally excluded; and, of course, wherever the legal estate of a copyhold is capable of an entail, the equitable interest is equally entailable.

Of the creation
of entails in
the trust of
copyholds.

CHAPTER III

OF THE UNFETTERING OF ENTAILS.

SECTION I.

The evasion of the Statute De donis, by Common Recoveries and Fines.

The gradual establishment of the doctrine of a bar of the issue in tail by the descent of a recompense in value.

THE first rule which the judges adopted in relation to the Statute *De donis conditionalibus*, was, that the issue could not avoid the alienation of his ancestor, provided he had a recompense in value by his ancestor for the estate-tail which he had alienated. (p) Another rule, upon the same principle, was, that lineal warranty (q) by the tenant in tail, with assets descending to the issue in tail, was a good bar of the estate-tail. This doctrine was established by analogy to the Statute of Gloucester, 6 Edw. 1, c. 3, by which it was enacted, that warranty by a tenant by the curtesy descending upon his son, should be no bar to the son entitled to his mother's inheritance, *unless assets descended from the father*. And so, the judges, in expounding the Statute *De donis*, held that lineal warranty with assets should be a sufficient bar to the estate-tail; it being, according to *Blackstone*, (r) nothing more than, in

(p) *Octavian Lombard's case*, stated in 10 Rep. 37 b, and other cases there cited.

(q) "Lineal warranty was, where the heir derived, or might by possibility have derived, his title to the land warranted, either from or through the ancestor who made the

warranty; as where a father, or an elder son in the lifetime of the father, released to the disseisor of either of themselves, or the grandfather, with warranty, this was lineal to the younger son."—2 Bl. Com. 301.

(r) 2 Com. 303. And see Litt. ss. 712, 749.

effect, exchanging the lands entailed, for others of equal value. It will be observed that in the preceding modes of barring estates-tail, the recompense in value, which descended to the issue in tail, was a real and *bond fide* recompense; and as far, therefore, as they were concerned, no great advances had been made towards the unfettering of estates-tail, because by them no loss accrued to the issue inheritable to the entail. It was, however, also determined that such of the heirs of tenant in tail as were entitled in remainder or reversion, might be barred by the collateral warranty of the ancestor descending upon them, even *without assets*; which was, manifestly, an important increase of the power of tenants in tail over their lands.

And of the bar of reversions and remainders by collateral warranty without recompense.

At length, the crying evils attendant on perpetuity of entail, and the imperfect character of the powers extended to tenants in tail towards the removal of those evils, induced the judges to have recourse to, what Sir *Wm. Blackstone* has happily denominated, "a kind of *pia fraus*;" the means, no less than the end of which, that learned writer considers worthy of admiration. This was effected in the twelfth year of the reign of Edw. 4, by the decision in a case, which may be deemed second only in importance to the Statute *De donis* itself. In this case, which is commonly called *Taltarum's case*, (s) the judges carried the principle of a *recompense* to a much greater length than any that had before occurred, and, in effect, determined that a *nominal* and *fictitious* recompense descending to the issue in tail, should be an effectual bar, not only to the issue in tail, but also to all persons in remainder or reversion. On the authority of the principles laid down in that case, depend the force and validity of that species of assurance called a *common recovery*; which, until a very late period, (t) was almost the universal mode of barring estates-tail and the

Invention of common recoveries upon the ground of a fictitious recompense to the issue.

(s) 12 Edw. 4, Year Book, 14, 19.

(t) The year 1834, since which time, the mode of barring estates tail is regulated by 3 & 4 Wm. 4, c. 74,

providing greater facilities for that purpose; as to which, *vide infra*, p. 42.

remainders and reversion expectant thereon, and acquiring a clear and indefeasible fee-simple.

Gladly adopted as a means of removing the grievances consequent on the statute *De donis*.

Thus after the lapse of nearly two centuries, and by a slow and gradual process, was devised and established a dexterous mode of evading the effect of a statute, which, as Mr. Justice *Blackstone* remarks, (u) was justly branded as the source of new contentions and mischiefs unknown to the Common law, and almost universally considered as the common grievance of the realm. And, notwithstanding that this judicial approbation of a scheme for unfettering estates-tail operated in direct contravention of the letter and spirit of the Statute *De donis*, and so trenched on the line of demarcation between the judicial and legislative functions, (v) the general convenience soon gave sanction and stability to this product of legal, or, more strictly, (as mitres then ruled in halls of justice) ecclesiastical ingenuity.

Before, however, the integrity of this new method of unfettering perpetual entails was finally and completely established, it was doomed to encounter, in the perverse-ness of the human will, a trial of its inseparability from the very essence of an estate-tail.

But the attempted restraints upon the liberty of suffering common recoveries, will more properly engage our attention, when we have remarked somewhat upon another mode of barring estates-tail, and upon the methods of destroying entails in copyhold lands.

Of the destruction of entails by fine.

The method of unfettering estates-tail of freehold lands to which allusion is made, was that by *fine*, which has been described to be, an amicable agreement or composition of a suit, whether real or fictitious, between the demandant and tenant, with the consent of the judges, and enrolled

(u) 2 Com. 116.

(v) "It is true, *prætoris est jus dicere non condere*, and this altering of the law, and evading the Statute of Westminster 2, seems to be a taking away the force of a positive law without the legislative power, but use

and custom have given common recoveries a sanction, &c."—Fig. Recov. 8: *sed vide*, *ib.* 21, where a common recovery is spoken of as "a conveyance excepted out of the statute *De donis*, by construction of law."

among the records of the Court, where the suit is commenced; by which lands and tenements are transferred from one person to another, or any other settlement is made relating to lands and tenements. (*w*)

Fines, though of an earlier origin than common recoveries, did not legally operate as a bar to estates-tail, until long after the time when that effect was allowed to the latter.

Not admitted as a bar to estates-tail so early as recoveries. Their effect, entirely by statute.

The operation of fines on estates-tail is entirely statutory; whereas that of recoveries was established by the judges without any legislative sanction, though that sanction has been indirectly accorded by subsequent enactments. Prior to the statute 4 Hen. 7, c. 24, fines by tenants in tail worked a *discontinuance* of the estate tail, and put the issue to their formedon; nor did that statute *expressly* impart to such fines any greater force, or give them any additional effect. Some ambiguous expressions in that act, however, gave rise to the question; and in the 19th year of Henry the Eighth, it was decided that the issue was barred by such a fine in pursuance of the statute 4 Hen. 7. (*x*) Doubts arising as to the correctness of this decision, the statute 32 Hen. 8, c. 36, was passed, by which it was enacted, that a fine with proclamations, levied of any lands, entailed to the person levying such fine, or to any of his ancestors, should bar such person and his heirs, claiming by force of such entail. Thus we see the Legislature itself repealed that clause of the statute *De donis*, which expressly enacted, that a fine levied of an estate-tail should be void, and the formidable structure of inalienable, unbarrable, perpetuity erected by that statute, was thoroughly razed to its foundations.

It only remains to be observed that fines do not destroy the remainders or reversion expectant on the estate-tail, but only create a base fee, to continue so long as there are issue inheritable to the estate-tail: therefore, a clear fee-

Fines do not affect remainders and reversions.

(*w*) 5 Cru. Dig. 10.

Bro. Ab. tit. Fine, pl. 1. Dyer,

(*x*) Year Book, 19 Hen. 8, 6 b.

3 a.

simple can only be acquired by means of a fine, in cases where the tenant in tail is entitled to the reversion or remainder in fee, in which the base fee created by the fine may merge.

SECTION II.

The various modes of disentailing Copyhold property.

Methods of
destroying
customary
estates-tail,
various.

The customary modes of barring entails in copyhold lands (when the custom allows of their creation) were, until a recent period (y), very diversified.

The first was by *surrender* merely; in support of which, it seems, there was no necessity for a special custom, and in the absence, therefore, of a custom pointing to any other mode of disentailing lands, this was the proper one to be resorted to. Another mode of barring entails in copyhold lands, was by *customary recovery* suffered in the lord's Court, which must have had the like forms as were observed in a recovery of lands of freehold tenure; but this mode must, it seems, have been authorized by a special custom. A third mode of barring customary entails was, by, what was technically called, *forfeiture and regrant*, which proceeded upon a custom for the tenant in tail to commit a forfeiture, whereupon the lord, after making proclamations, seized the copyhold, and then re-granted it to the copyholder, and his heirs, or otherwise according to his direction. This mode of disentailing customary lands, also required a custom in support of it. A *surrender to the use of a will* has also been allowed the effect of barring an entail, as well as of accomplishing the particular object contemplated by it. A *plaint in the nature of a fine* in the customary Court, was

(y) The reader will perceive that the course and order of this Treatise require a notice, however brief, of the

modes of unfettering entails formerly existing, although since superseded.

also an effectual bar to an estate-tail, provided there was a special custom authorizing it, but not otherwise. Such a fine had no force under the statute, 4 Hen. 7, as it was not levied pursuant to it, or in conformity with its provisions. Any one of these modes of barring customary entails might have been concurrent with any other of them, as, for example, a custom to bar by surrender was not inconsistent with the existence of a custom to bar by common recovery in the same manor.

In regard to *equitable* entails, the rule was, that the customary mode of barring the entail of the legal state of copyhold lands, must be observed in barring the equitable entail of such lands.

Some doubt appears to have existed whether an estate-tail in copyhold lands might have been barred by a fine, with proclamations levied in the Court of Common Pleas, either of the legal or the equitable interest; it being urged, on the one hand, that the freehold interest in the lands is within the jurisdiction of the Courts of Westminster Hall; and, on the other, that a fine by a copyholder in the Court of Common Pleas would be void, on account of his inability either to implead or be impleaded in that Court, in respect of his copyhold lands. In the writer's view, the civil process of every copyholder in respect of his customary tenements, must be brought by plaint or bill to the lord in his Court; and as a fine was but a composition of a suit, there does not appear any valid ground of distinction between a fine levied of copyhold land, and of land of the tenure of ancient demesne; of which latter, it is well known, a fine could never properly be levied in the Court of Common Pleas.

Of the effect of a fine levied by tenants in tail of copyholds in the Court of Common Pleas.

It seems to have been always considered clear that a *common recovery* in the Courts of Westminster suffered of copyhold lands, would not be a good bar to an estate-tail; since a *customary recovery* was the usually-prescribed mode of barring an entail in a copyhold.

And of similar common recovery.

SECTION III.

The Assurances substituted by 3 & 4 Gul. 4, c. 74.

Necessity for
an alteration
in the methods
of barring
estates-tail.

The cumbrous and expensive character of the modes of barring estates-tail, invented to evade, or established on the ruins of, the statute *De donis conditionalibus*, and the arbitrary and uncertain methods of destroying customary entails, prevalent in different copyhold manors, led the way for the adoption of a more uniform, easy, and simple system of unfettering entailed property. The evil of the existence of perpetual unbarrable entails in any species of property being admitted, little reason could be shown for making resort to modes of escape from that evil as uninviting as possible; nor could any intelligent approval be given to disentailing assurances founded on fictions and stratagems unreasonable in theory, and ludicrous in their practical application. That which might have sufficed as a salvo to the consciences of judges for evading a Legislative enactment, whilst paying a tribute to the spirit of their age, ceased to be invested with any such adventitious sanctity, after successive Legislatures had, in various ways and degrees, recognised the current evasions of a law, whose influence was admitted to be hurtful, but which, moral strength seemed wanting, to subvert, upon grounds other than fictitious. Reason demanded modes of unfettering entails; and absurdity was the characteristic of such as were mostly in use.

Alteration
effected by 3
& 4 Gul. 4,
c. 74.

The issue of considerations such as these, was the simultaneous abolition, by statute 3 & 4 Gul. 4, c. 74, of common recoveries and fines, and all the awkward apparatus for disentailing copyhold lands, except the mode by surrender. The substituted assurances are, in the case of freehold estates-tail, whether legal or equitable, a simple deed enrolled in Chancery within six months from its date; and in regard to entails of the legal estate in copyholds, a

common surrender, and of the equitable interest in lands of the same tenure, a deed entered on the Court rolls of the manor, or a surrender.

Thus have disappeared from the catalogue of legal performances, fictitious recompences, mysterious vouchings to warranty, unreal compositions of suits never instituted, and pretended re-grants upon forfeitures never committed, with the numerous train of *actores fabularum* appropriate to each. But, at the same time, from a remembrance of the vast benefits conferred through the instrumentality of these departed products of legal ingenuity, (all artificial though they were) in removing the evils of perpetuity of entail, let our elegy be—"peace to their ashes."

CHAPTER IV.

OF THE FIRST ATTEMPTS TO RESTRICT THE LEGAL POWER OF
ALIENATION, BY CONDITIONS AND LIMITATIONS RESTRAIN-
ING THE UNFETTERING OF ESTATES-TAIL.

Prefatory
observations.

STRANGE as it may seem, an effectual method had no sooner been invented for freeing estates-tail from the fetters of unbarment, than some men seemed eagerly desirous of reimposing them, in the shape of conditions or limitations annexed to or engrafted upon the estate in tail at the time of its creation, determining it on any attempt being made to bar or destroy it. These may, indeed, be regarded as the first direct attempts of which we have any information, at the creation of interests in property, the effect of which would be its total abstraction from, or loss for the purposes of commerce. The perpetuity of entail consequent on the statute *De donis* was a shackle on alienation imposed by the *Legislature*, in opposition to the genius and spirit of the Common law, and cannot, therefore, be regarded as an exemplification of the *private* exercise of the *legal* power of alienation, in a manner detrimental to its future unrestricted enjoyment. An interest, consequently, belongs to these incipient exertions of men to enchain their property, in a perpetuity of settlement or line of transmission, peculiarly their own.

At first doubtful whether conditions restraining the right of barring estates-tail were good.

Some conflict of opinion appears to have first existed respecting the validity of conditions restrictive of alienation, annexed to estates-tail; and the preponderance of authority may even be said to have favoured the view of their legality.

In the reign of Elizabeth, however, it was definitely settled that the privilege of levying a fine or suffering a recovery was as inherent in an estate-tail, as a power of alienation in an estate in fee-simple; and that, therefore, any prohibition of the exercise of that privilege was to be regarded as repugnant to the nature of the estate, and, consequently, void. Thus, to mention but one authority, a testator devised (s) lands to several daughters successively in tail, with a proviso that if any of them should conclude and agree to or for the doing or execution of any act or devise whereby the lands entailed, or any estate or remainder thereof, should by any ways or means be discontinued, aliened, or put away from the person or persons to whom the same were devised, or should willingly or advisedly do any act or thing whereby the said lands might not descend, remain, or come, as limited by the will, that then the daughter or daughters so concluding and agreeing to and for the doing and execution of any such act or devise as aforesaid should, immediately after such conclusion and agreement, lose and forfeit all such estate and benefit as she or they might have or claim, in such manner as if she or they had never been named in the will, and that thenceforth the estate and estates given to her or them should utterly cease and be determined, as if she or they were dead without heir of her or their bodies. The first devisee in tail agreed to suffer a common recovery, and suffered one accordingly; upon which the devisee next in remainder claimed the estate, as forfeited under the proviso. It was adjudged, however, that tenant in tail cannot be restrained by any condition or limitation from suffering a recovery; and it was also laid down that the levying a fine within the statute 4 Hen. 7, c. 24, and 32 Hen. 8, c. 36, in bar of the issue, was among those incidents to an estate-tail, which could not be restrained by condition.

Afterwards settled that such right is inherent in estate-tail.

(s) *Mary Portington's case*, 10 Rep. 37.

In whatever form the restriction is attempted, it will be void.

Restrictions upon the power of alienation by tenant in tail have been attempted in various forms, but they have as frequently met with a repulse. And it is evident that no other rule could have been adopted in reference to them, unless the judges were willing to see their own scheme for unfettering estates-tail rendered abortive, by the mere annexation to them of restrictive provisos of the kind under consideration. Mr. *Butler* (a) has thus briefly summed up the results of decided authorities upon the subject. That the power to suffer a common recovery cannot be restrained by *condition*, appears by Co. Lit. 233 b, 234 a, and *Sonday's* case, 9 Rep. 128. That it cannot be restrained by *limitation*, appears by Cro. Jac. 696, *Foy v. Hinde*, and by *Sonday's* case, and other books. That it cannot be restrained by *custom*, appears by the case of *Taylor v. Shaw*, in Carter, 6 and 22. That it cannot be restrained by *recognisance*, or by *statute*, appears by *Pool's* case, cited in Moore, 810. That it cannot be restrained by *covenant*, appears in the case of *Collins v. Plummer*, 1 P. Wms. 104. That an *attempt* to suffer a common recovery cannot be restrained, appears by *Corbet's* case, in 1 Rep. 83, *Mildmay's* case, 6 Rep. 40, and the case of *Pierce v. Wise*, in Vent. 321. And that a *conclusion* to suffer a common recovery cannot be restrained, appears by *Mary Portington's* case, in 10 Rep. 55. To these it may be added, that the power of tenant in tail to suffer a common recovery cannot be restrained by *bond*; (b) and that a *trust to raise a sum of money* in the event of alienation by tenant in tail is also void. (c)

(a) Note to Co. Litt.

(b) It seems a question, however, whether the obligor does not incur a *personal* liability on his bond, in case of alienation; the act contemplated by the condition, not being *malum in se*, but only *malum prohibitum*. The

like observation applies to a covenant. See on this subject Co. Litt. 206 b. *Collins v. Plummer*, 1 P. Wms. 104; 2 Vern. 635. *Randell on Perpetuity*, 55, 56.

(c) *Mainwaring v. Baxter*, 5 Ves. 458.

It may, too, be laid down, that all similar restrictions upon the right of tenant in tail to levy a *fine* are as invalid, as when applied to his power of suffering a recovery.

And it is to be observed, in regard to copyhold tenure, wherever the tenure warrants the creation of an estate-tail, a right of barring or destroying it, follows as a necessary incident to such estate, and, consequently, any restriction upon the exercise of that power, whether by an alleged custom, or by limitation or condition in the assurance creating the entail, is void as tending to a perpetuity.

This power equally belongs to customary tenants in tail of copyhold lands.

As equity follows the law upon the point of destructibility of estates-tail, it follows that, not only in the case of express or direct trusts, but also of trusts executory, or trusts to be more fully declared or carried out by a future settlement, any attempt to restrict this inherent right of tenant in tail, will not be permitted to have effect, whether in the form of direction, condition, limitation, clause of forfeiture, or otherwise.

Restrictions on this right void also in equity.

This inseparable privilege of estates-tail, however, does not extend to nullify provisions debarring persons having life-interests from concurring with a tenant in tail in remainder in destruction of the entail during the continuance of the estate for life. It is *necessary* for a tenant in tail in remainder to obtain the concurrence of the owner of the preceding life-estate, in order to an effectual bar of his estate-tail; but there is no inherent *right* in the tenant for life to have the power of so concurring. Accordingly, in a recent case, (*d*) the Court of Chancery gave effect to a trust executory, containing a provision against the tenant for life, (whom the testator seemed to have mistaken for a tenant in tail,) alienating the family estate, (by reference to the limitations of which, the devised property was directed to be settled) by decreeing that the estates devised should be vested in trustees during the life of the tenant for life,

But tenant for life may be debarred from joining with tenant in tail in remainder in destruction of the entail during his life.

(*d*) *Woolmore v. Burrows*, 1 Sim. 512.

in trust for him; which provision would obviously disable him, by any act during his life, from aliening, or concurring in an alienation of the estates; the remainders to be limited in them, being legal, and the case arising prior to the Act for Abolishing Fines and Recoveries. It must be observed, however, in reference to cases falling within the operation of 3 & 4 Gul. 4, c. 74, that the only modes by which a tenant in tail in remainder can be debarred from destroying the estate-tail and remainders, before the former comes into possession, are the limitation of a prior estate for years not determinable on lives, no freehold interest being vested in any other person; and (as it should seem) a limitation expressly determining the particular-estate, (of whatever nature,) on its owner concurring with the remainder-man in tail in a destruction of the entail; which does not seem to be a "device, shift, or contrivance," within the meaning of the 36th section of the before-mentioned statute.

Right to
execute new
disentailing
assurances
equally in-
separable from
estate-tail.

Notwithstanding the abolition of fines and recoveries, and the fact that the assurances substituted for them do not enjoy a like intrinsic force and operation, there can be no doubt that any attempted restriction upon the power of exercising the new modes of unfettering entails will be deemed as entirely objectionable and void, as were all restraints upon the right of tenant in tail to levy a fine or suffer a recovery. Indeed, the new disentailing assurances may be considered in this respect as of superior importance; inasmuch as the Legislature has directly annexed the power of executing them to the estate of tenant in tail; which certainly could not be predicated equally of a common recovery, under the old system of destroying entails.

CHAPTER V.

OF THE USES PRIOR TO THE STATUTE 27 HEN. 8, WHICH
OPERATED ADVERSELY TO THE RULES OF THE COMMON
LAW.

OF Uses prior to the statute of 27 Hen. 8, generally known as the *Statute of Uses*, it will be necessary here to say no more than will suffice to trace their connection with the various modifications of Uses since the statute, to which the laws against remoteness are especially applicable. With the origin of Uses as invented by ingenious ecclesiastics, for the purpose of evading the rigorous enactments of the statutes of Mortmain; with the immunities enjoyed by *cestui que use* from the various services and feudal liabilities attendant on legal tenure; and with the progressive assimilation of Uses to the Common law of the land; it is here assumed that the learned reader is well conversant. Our present object will be, to bestow a short notice on those limitations of Uses prior to the statute, which Chancery allowed in derogation of the rules of the ancient Common law, and which, being, by the statute, converted into legal estates, originated the necessity for the salutary rules forming the subjects of consideration in the following pages.

On inquiring into the modes of limiting Uses before the statute of Hen. 8, no feature is more striking than the utter contrariety between the strict, undeviating, and well-defined rules of the Common law, on the one hand, and the entire absence of any regular forms or rules, according to

Scope of the present observations with respect to Uses.

Chief characteristic of Uses before stat. 27 Hen. 8, their entire disregard of the strict rules of the common law.

which Uses should be modified or modelled, on the other. (e) The Court of Chancery seems to have had but one object in its administration of Uses; and *that*, (certainly one which defied all rule or form) the giving complete effect to the expressed or implied intentions of donors or testators, however whimsical, capricious, or opposed to the rules of the Common law.

The different modifications of estates allowed under the doctrine of Uses which were opposed to the rules of the Common law.

Not only was the use disposable by will (which, doubtless, was a beneficial innovation), but by way of use, a freehold was made to commence *in futuro*; a fee to be limited on or after a fee; and one estate to be defeated, and another to arise before the natural expiration of the first. (f) Each of these three modifications of estates, the reader will remember, was disallowed at Common law: the first, because the freehold could never be in abeyance: the second, because as the law knew no higher estate than a fee-simple, nothing remained to be limited over, after it was once disposed of; and also no estate at Common law could be determined otherwise than by condition or natural expiration, and on a condition no further estate could be limited to any other person: the third, because the Common law regarded no future interest other than as a remainder; and a remainder must wait for the natural and regular determination of the particular-estate. To exemplify these several classes:—A. might make a feoffment to B. and his heirs, to the use of C. and his heirs, on his marriage, or after seven years, or other future period or event. So, A. might covenant to stand seised to the use of B. and his heirs, at any such future fixed period, or on the happening of any such future event. These are instances of the first kind of limitations: the interest of C., in the one case, and of B., in the other, were allowed to spring up, independently, at a distance of time; it being settled that a future interest might be created in the first instance, the grantor retaining the entire in-

(e) 1 Cru. Dig. 438.

(f) Bro. Ab. tit. Feoff. al Use, pl.

30. 13 Rep. 48. Jenk. Cent. 8,

52. Bac. Read. Uses, 18.

heritance, determinable on the happening of the event upon which the future use was to arise. And so, again, A. might make a feoffment to B., to the use of B. and his heirs, provided that on the death of A., or the marriage of C., the estate should remain to the use of C. and his heirs. Here, B. took a fee-simple, determinable on the happening of the future event, when the use in favor of C. arose, in defiance of the rule of the Common law, which would not admit of a remainder after a fee-simple. True, it was a fee-simple *determinable*, but still, even on such an estate, the Common law did not allow any other to be grafted, but gave a right of entry only to the grantor or his representatives, on the happening of the specified event, under a condition reserved for the purpose in the deed. And, again, A. might make a feoffment to B. for his life, provided that after the decease of C., or D.'s return from Rome, the land should go to D. in tail, or in fee. In such a case, we see that the future use might take effect by the happening of the specified event, before the regular determination of the first estate, in opposition to the rule, that every remainder must wait for the natural expiration of the particular-estate, and not operate to defeat or divest it. And not only might these future interests be created *directly* by means of Uses in the original instrument, but also a *Power* might be reserved to the grantor or some other person, of altering all or any of the Uses, and of limiting others at a future period, (g) and which substituted Uses were all allowed the same latitude of operation, as those originally limited in the instrument creating the Power. Here, again, was an innovation on the strictness of the ancient Common law, which would only allow a deed of defeazance coeval with the grant itself, or a condition actually contained in it, upon events specifically mentioned. "This Power," says Lord Coke, "being coupled with an Use is allowed to be good and not repugnant to

(g) Co. Litt. 237. 3 Cha. Ca. 66.

the former estates. But in case of a feoffment or other conveyance, whereby the feoffee or grantee, &c., is in by the Common law, such power were merely repugnant and void." (h) And, lastly, the Court of Chancery allowed, through the medium of Uses, the limitation of a freehold remainder in contingency after a preceding estate for years, on the ground that the feoffees remained tenants of the legal freehold, and that their estate supported the remainder. (i)

Such was the system of Uses as administered by the Court of Chancery, prior to the statute of 27 Hen. 8; a system, which, while it scrupulously attended to and carefully consulted the conveniences and necessities of families, was distinguished by nothing more than its entire disregard of the strict and undeviating rules of the ancient Common law of the land.

(h) Co. Litt. 237. 1 Rep. 135, a. (i) F. C. R. 284.

CHAPTER VI.

OF THE STATUTE OF USES ; AND ITS EFFECT IN CREATING
SPRINGING, SHIFTING, AND FUTURE USES.

NOTWITHSTANDING the many statutes by which it was attempted to subject Uses to the rules of the Common law, the mischiefs and abuses that resulted from them increased to such an extent, that the application of an extensive and adequate remedy became a matter of absolute necessity. The previous statutes, remedying some of the inconveniences attendant on Uses, had but palliated the growing grievance, and afforded scope for the exercise of the same ingenuity in evading their provisions, which had been exemplified in the original invention of Uses.

The result of long-continued experience of their evils, was the famous statute of 27 Hen. 8, c. 10, commonly called the *Statute of Uses*, which enacted, that where any person or persons stood or were seised, or at any time thereafter, should happen to be seised, of and in any honors, or other hereditaments, to the use, confidence, or trust of any other person or persons, or of any body politic, by any manner of means whatsoever it should be, that in every such case, all such person and persons, and bodies politic, that had, or thereafter should have, any such use, confidence, or trust, in fee-simple, fee-tail, for term of life, or for years, or otherwise, or any use, confidence, or trust, in remainder or reverter, should from thenceforth stand and be seised, deemed, and adjudged, in lawful seisin, estate, and possession, of and in the same honors and hereditaments with their

The conversion
of Uses into
legal estates by
stat. 27 Hen.
8, c. 10.

appurtenances, to all intents, constructions, and purposes in the law, of and in such like estates as they had or should have had in use, trust, or confidence, of or in the same, and that the estate, title, right, and possession, that was in such person or persons, that thereafter should be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust, of any such person or persons, or of any body politic, should be from thenceforth clearly deemed and adjudged to be in him or them that had or should have such use, confidence, or trust, after such quality, manner, form, and condition, as they had before in or to the use, confidence, or trust, that was in them.

Conveyances to Uses not abolished by the statute.

The effect of this important statute was, not to abolish the conveyance to Uses, but only to annihilate the intervening estate of the releasee, and turn the interest of *cestui que use* into a legal instead of an equitable ownership. (*k*) The intention of the framers of the statute was, evidently, the entire abolition of Uses, or, as was once quaintly remarked, (*l*) "because Uses were so subtle and ungovernable, they have, with an indissoluble knot, coupled and married them to the land, which, of all the elements, is the most ponderous and immoveable."

At first held that no Uses were executed by the statute not limited in accordance with the rules of the Common law.

When the operation and effect of the Statute of Uses first engaged the consideration of the Courts of Law, it was held by some of the judges (*m*) that no Uses should be executed or converted into legal estates by the statute, which were limited against the rules of the Common law, for that it appeared by the preamble of the statute, that it was the intent of the makers of the act to restore the good and ancient Common law, which was in a manner subverted by abusive and erroneous Uses, and not to give more privilege to the execution of Uses, than to estates which were executed by the ancient Common law.

This rigor

But though the Courts so far adhered to this construction

(*k*) 2 Bl. Com. 333.

(*m*) 1 Rep. 130.

(*l*) 1 Rep. 124.

of the statute, that the same technical words of limitation were and are now required (n) in the creation of estates through the medium of Uses, as in the creation of estates at Common law; which in Chancery was not necessary before the statute; (o) yet the various necessities of mankind early induced the judges to depart from the rigor and simplicity of the Common law, and to allow a more minute and complex construction upon conveyances to Uses than upon others. Thus, advantage was soon taken of an expression in the Statute of Uses, in order to support several of those limitations which had been allowed by the Court of Chancery in declarations of Uses, so long as they were "things merely in trust and confidence." (p) The Statute of Uses transfers the estate in the land to the *cestui que use*, "after such quality, manner, form, and condition as they had before in or to the use, confidence, or trust, that was in them." Now, as we have before seen, (q) through the medium of declarations of Uses prior to the statute 27 Hen. 8, the Court of Chancery allowed the limitation of a freehold to commence *in futuro*; of a fee to take effect after a fee previously limited; of a future Use to defeat and arise before the natural expiration of a prior interest; of a Power of revocation and new appointment either to the grantor or a stranger; and of a contingent interest in the fee or freehold after a preceding term for years. All these limitations were in direct violation of some of the first principles of the Common law, and, obviously, therefore, if in such cases the statute transferred the possession to the *cestui que use*, "in the same quality, form, and condition, as he had in the Use," the supposed construction would give to the statute the operation of creating legal estates to which the law was previously a stranger.

afterwards departed from.

(n) 1 Rep. 87 b. 1 Sand. Uses, Tr. 143 a. Anon, Mod. 608. 2 122. Gilb. Uses and Tr., 1st edit. Leon. 16.

76.

(p) 1 Rep. 87 b.

(o) Sugd. note to Gilb. Uses and

(q) *Vide supra*, pp. 50, 51.

Except as to contingent remainders limited after terms for years, in reference to which the ancient rule was preserved.

With reference, indeed, to the last of the above-mentioned limitations,—that of a contingent interest in the fee after a preceding term for years,—the Common law rule requiring that a contingent remainder of the freehold should be preceded by a particular-estate of freehold also, has been preserved, on the ground that no estate remains in the feoffees or releasees to Uses, to support the remainder. As, where (r) a person conveyed by lease and release to trustees and their heirs, to the use of himself for ninety-nine years, remainder to the use of trustees for twenty-five years, remainder to the use of the heirs-male of his own body, remainder to the use of his own right heirs; it was held, that the limitation to the heirs-male of the body of the releasor was void, because there was no preceding estate of freehold to support it. Notwithstanding the doctrine of the necessity of a freehold estate to support a contingent remainder by way of Use since the statute, is thus well established; a writer (s) has laid it down as settled, that in the case of a limitation to the use of A. for a term of years, with remainder to his first unborn son, “the remainder would be good, because the contingent Use arises out of the estate of the feoffees.” How such a monstrous dogma could find its way into a modern treatise is a question not easy of solution!

With the exception just noticed, the Courts of law, in process of time, admitted of all those limitations in conveyances to Uses after the statute of 27 Hen. 8, which had been previously allowed by the Court of Chancery, and determined that in such cases the statute would transfer the possession to the *cestui que use*, “in the same quality, form, and condition, as he had in the Use.” And in the regulation of these limitations, very many of the rules before established

(r) *Adams v. Savage*, 2 Salk. 679.
Vide also *Davies v. Speed*, Show.
Parl. Ca. 104. Sugd. note to Gilb.

Uses and Tr. 165. F. C. R., 284.
(s) *Randell on Perpetuity*, 76.

in Equity, were also adopted by the judges of the Common law.

1. With respect to Uses limited to arise *in futuro*, without any preceding estate to support them, which are usually called *Springing* or *Contingent Uses*, it was adjudged very shortly after the Statute of Uses, that the Use need not always be executed the instant the conveyance is made; but, that if it cannot take effect at that time, the operation of the statute may be postponed until the Use shall arise upon some future contingency. (t) Thus, where (u) J. M., being seised of certain lands in fee, levied a fine thereof, and by indenture declared the use of the fine to be to himself, and to such wife and wives as the said J. M. should happen afterwards to marry, by whatever names she or they might be called, for and during their natural lives, and the life of the survivor of them, with divers remainders over; and afterwards the said J. M. took to wife one A., and then died. Whether she should take anything by the said indenture or fine, or not, was the question; and by the opinion of *Wray* and *Meade*, Serjeants, and *Plowden* and *Onslow*, Solicitors, she might, and thereto they subscribed their names. *Moore* states that, the parties not being satisfied with this determination, the case was carried into the Court of Common Pleas, where it was adjudged in the same manner. And also where (v) a person made a feoffment, and it was declared by indenture that it should be to the use of himself and A. his wife, that should be, after their marriage, and of the heirs of their bodies; and he took A. to wife. Whether she would take by the limitation of this Use was the question. *Coke*, Attorney-General, contended that she should not, for, presently, by the feoffment, the fee was in the husband by the possession executed to the Use which he had before the marriage, which could not, after the marriage, be di-

1. Uses limited to take effect *in futuro*, or *Springing Uses*.

(t) Bro. Ab. tit. Feoff. al Use, 340 a, pl. 50. Bac. Uses, 63.

(v) *Woodliff v. Drury*, Cro. Elis. 439.

(u) *Mutton's case*, Dyer, 274, b.

vided, and made an estate-tail in him, as he had the fee in him until the marriage; for it might have been that the marriage had never taken effect, and that would have confounded the other Use; and Uses *in futuro* could not arise upon such future acts, for then an Use would rise out of an Use. But all the justices held, that although the feoffor be seized in fee in the meantime, as in truth he was, yet, by the marriage, the new Use should arise and vest.

In *Mutton's case*, and *Woodliff v. Drury*, the assurances upon which the Uses were declared were those which operated a *transmutation of possession*; but in a more modern case, (*w*) the doctrine in question was admitted, and a freehold allowed to arise *in futuro*, upon a *covenant to stand seized* to Uses, under which there is *no* transmutation of possession. The distinction between Springing Uses limited in those assurances which do, and those which do not, operate by transmutation of possession, is, that the former arise out of the seisin of the feoffees or releasees to Uses, and the latter, out of the seisin of the covenantor or bargainor.

2. Uses limiting a fee after or upon a previous fee, or Shifting Uses.

2. As before the Statute of Uses, equity permitted a fee to be limited to take effect after a fee, on the happening of any specified event, so, now, it was determined, that in such cases, the statute executed the legal estate in the same manner as an Use before subsisted. (*x*) Such Uses were called Shifting or Secondary Uses: and their utility is such that they form the groundwork of most modern settlements. The following is the first case that occurred after the statute, in which the validity of such limitations of Uses was discussed. A person made (*y*) a feoffment to the use of W.

(*w*) *Roe v. Trimmer*, 2 Wils. 75.

(*x*) Sir E. Sugden, in a note to his edition of Gilb. Uses and Tr., p. 164, says, that Shifting Uses were allowed very shortly after the statute; while Mr. Hargrave, in a note to Co. Litt. 271, b, n. 1, s. iii. 2, states, that the

judges seem to have long hesitated whether they should receive them. The evidence appears to favour the former statement.

(*y*) Bro. Ab. tit. Feoff. al Use, 339 a, pl. 30. 1 Roll. Abr. 415, pl. 12.

and his heirs, until A. paid 40*l.* to W., and then to the use of A. and his heirs; A. paid the 40*l.* Some of the judges said, that if A. entered, he would become *ipso facto* seised in fee, for W. being seised in the fee by the Statute of Uses, A. would be able to divest that fee, and transfer it to himself upon performance of the condition. Others were of opinion, that the payment of the money and the entry of A. had no effect, without an entry by the feoffees, and then, *quâcunque viâ datâ*, the entry would be good, and A. would become seised according to the terms of the deed. To this it was added, that a Use might change from one person to another by an act or circumstance *ex post facto*, as well since as before the statute. And so, where (a) A., seised of the manor of K., made a feoffment of it, to the use of trustees and their heirs, upon condition, that if they did not pay 10,000*l.* in fifteen days, then it should be to the use of the feoffor and M. his wife, remainder to Thomas, their second son, in tail, with divers remainders over. The money was not paid; and it was resolved that the Uses arose, and that, after the death of the feoffor and his wife, Thomas, the second son, was well entitled to the land. Thus was another species of legal estate introduced by the Statute of Uses, in opposition to that rule of the ancient Common law, which denied validity to any limitation of a fee, to take effect after, or in derogation of a previous fee. (a)

3. Another species of limitations, upon which the Statute of Uses operates, and also denominated *Shifting Uses*, is, where a particular-estate, as for life, or in tail, is limited, with a subsequent estate to take effect in possession on an event which may operate in derogation, abridgment, or exclusion, of the first estate, instead of awaiting its regular expiration or determination. (b) As, if

3. Uses limited in derogation of previous partial estates, also called *Shifting Uses*.

(z) *Harwell v. Lucas*, Moo. 99. 1 Leon. 264. Pollexf. 78. 10 Mod. 423.

(a) Dyer, 23 a, pl. 12. 3 Cha. Ca. 19.

(b) F. C. R., 273—276. *Vide* Dyer, 314, pl. 96. Moo. 99, pl. 243. Ley, 54. 2 Leon. 16. 1 Roll. Abr. 415. Sugd. note to Gilb. Uses and Tr. 178.

an estate be limited to the use of A. for life, or to the use of A. indefinitely, provided that, when C. returns from Rome, it shall thenceforth immediately be to the use of B. in fee. Here, the first estate is an estate for the life of A., and a remainder strictly so called can only be limited expectant on the determination of that estate by such events as a life-estate is liable to be determined by; and, therefore, when the subsequent limitation is to commence and take effect in possession, from an event which may eventually interfere with, and in part defeat, the first estate, it is evident that such a limitation cannot be a remainder within the rules of the Common law, but can only take effect under the Statute of Uses, by analogy to the like limitations previously allowed in Chancery.

4. Uses creating powers of revocation and appointment.

4. It has been before observed, (c) that by the rules of the Common law, no restriction or qualification could be annexed to a conveyance of lands, other than a deed of defeazance, or a condition. Any power to revoke a deed, whether reserved to the grantor or a stranger, was repugnant and absolutely void. And we have also seen, (d) that there was no such repugnancy as to trusts in Chancery, which were simple declarations, or directions to the person seised of the legal estate, in what manner and to whom he should convey the estate. The Statute of Uses vests the legal estate in the *cestui que use*, after "such quality, manner, and form, as he had in the Use," and the same reasoning, therefore, which led the Courts of Common law to consider Springing and Shifting Uses, within the operation of the statute, induced them also to conclude, that in all conveyances to Uses, a power might be reserved of revoking a former limitation of a Use, and appointing a new Use to some other person. (e) The estates arising from the execution of a Power of revocation and

These Uses, partly future or contingent,

(c) *Supra*, pp. 51, 52.

Pow. 3rd edit, 4.

(d) *Supra*, p. 51; and see Sugd.

(e) Co. Litt. 237. 1 Rep. 174.

appointment have been, by some writers, (f) classed among those Uses which, on account of the uncertainty of the events on which they depend, are termed *Future* or *Contingent Uses*; but the better and more general opinion seems to be, (g) that they partake, partly, of the nature of Contingent Uses, and, partly, of that of Shifting Uses. The Uses to be raised under Powers are merely tantamount to *Future* or *Contingent Uses*, because they are not *in esse*, or defined, until ascertained and limited under the Power; but they may also be said to be *Shifting Uses*, inasmuch as, when ascertained and limited, their operation is, to divest preceding estates, or estates which would otherwise come into possession, in favor of those created by the execution of the Power. (h)

and partly
shifting.

All limitations of Springing, Shifting, and Contingent Uses, when they arise, take effect out of the seisin of the feoffees or releasees, in all cases where the limitations are created by conveyances *operating by transmutation of possession*, as a fine, recovery, feoffment, release, &c.; and out of the seisin of the grantor, where they arise under deeds *not* operating by transmutation of possession, as a bargain and sale, and covenant to stand seised.

The seisin out
of which these
various limita-
tions of Uses
take effect.

On the character and office of this seisin, much learning and ingenuity have been spent by most legal writers, whose subject has led them to the consideration of the operation of the Statute of Uses. By some, (i) the existence of a *scintilla juris*, or possibility of seisin, (even after Uses covering the whole fee are executed by the statute) is asserted, and, what is of more importance, its destructibility also. By others, again, (k) this *scintilla* is denied, and the *relation* of

And therein of
the doctrine of
scintilla juris.

(f) Booth's Opinion at the end of Sheph. Touchst. 1 Cru. Dig. 438.

(g) Sugd. Pow. 3rd edit., 12. Sugd. Gilb. Uses and Tr. 152. Burt. Elem. Comp. 66. Randell Perp. 66.

(h) Sugd. Gilb. Uses and Tr. 152, 160.

(i) Booth's Opinion in Sheph.

Touchst. 1 Rep. 130, 137. Com. Dig. tit. Uses. Sand. Uses and Tr. vol. 1, 110, 175; vol. 2, 33. Gilb. Uses and Tr. 131. Burt. Elem. Comp. 63.

(k) Sugd. Pow. 3rd edit., 11. Fonbl. Eq. lib. 2, c. 6. F. C. R. 300, *et seq.* 1 Prest. Estates, 169.

The question practically of no moment.

contingent Uses, as they arise, to the original seisin, without any remaining possibility, maintained. There are decisions seemingly supporting both views of the question, the application and decisiveness of which are alternately denied by the respective controversialists. Whatever be the nature of this seisin,—whether it be *in nubibus*, *in mare*, *in terra*, or *in custodia legis*,—the question is of little practical importance. (l) The Uses, whenever they arise, are executed by force of the statute, and no one ever thinks of inquiring the nature of the seisin which served them, except as to its original sufficiency. Certain it is, however, that the consequences of the doctrine of *scintilla juris*, were they legitimately carried out, would soon render the question of more than theoretical importance, as has been ably shown by the author of the *Treatise on Powers*. But, as before observed, neither they who espouse, nor they who deny the doctrine, treat it as of any importance in practice; which, perhaps, is an argument against the existence of the *scintilla*, more forcible than any, a whole treatise of the ablest reasoning could supply. (m)

General remarks as to the operation of the statute 27 Hen. 8, and the convenience of the estates introduced by it.

The establishment of the validity of these various limitations of Uses was one of the most important results of the statute 27 Hen. 8; and the necessary consequence of the Courts of Law taking cognizance of such limitations was the curtailment of that power over landed property which was previously exercised by the Court of Chancery, through the medium of Uses. The utility of Shifting, Springing, and Future Uses in the carrying out of personal and family arrangements, and the satisfaction of natural claims by pro-

(l) *Sagd* note to *Gilb. Uses* and *Tr.* 301.

(m) It is a curious circumstance that the most strenuous opponent of the doctrine of *scintilla juris* should (in reference to the question of the destructibility of shifting Uses by the owner of the previous estate) tran-

scribe, *literatim*, an opinion of Mr. Serjeant *Hill*, containing a marked approval of the doctrine, and that, without any observation, although the existence of the *scintilla* was the ground of the Serjeant's opinion upon the point under his consideration. See *Sagd. Gilb. Uses* and *Tr.* 288.

viding for a numerous relationship, can scarcely be over-estimated; for, as is well observed by the *Real Property Commissioners*, they are, "by their pliability, adapted to every kind of provision which can be required in a family arrangement."

It is foreign to the purpose of this Treatise, to inquire minutely into those technical scruples of the judges of the Common law in regard to the operation of the statute, from which arose the doctrines, that the statute does not transfer the possession, where a *Use is limited on a Use*; nor where Uses are declared of copyhold lands, or of terms of years, or of other chattel interests; nor where there is a trust for the *payment of rents* by the releasee to the *cestui que use*. Suffice it to observe that in these several cases, Uses were held not to be executed by the statute, but still continued separate, and distinct from the legal estate. The *cestui que use*, therefore, or, as he is now termed, *cestui que trust*, in such cases, was driven into the Court of Chancery, to seek that protection of his rights which the Courts of Common law denied. And it was determined, that though the Uses in question were not such as the statute could execute, they were still Trusts in equity, which in conscience ought to be performed. Thus was the old doctrine of Uses revived under the denomination of Trusts; in the support and administration of which, the Court of Chancery has wisely avoided, in a great degree, those mischiefs which made Uses intolerable. (a)

Origin of trusts in the limited construction of stat. 27 Hen. 8, by the common law judges.

In subsequent pages, we shall have occasion to make frequent mention of Trusts and Trust-estates, but it is not here deemed necessary to do more than thus slightly refer to their origin, in the limited operation of the Statute of Uses, as explained and construed by the judges of the Common law.

It has been matter of much controversy, whether Spring- The question

(a) 2 Bl. Com. 337.

whether springing and shifting uses may be created in surrenders of copyholds.

ing and Shifting Uses can be limited in surrenders of copyhold estates, as in conveyances to Uses under the statute of 27 Hen. 8. (o) Until the recent case of *Boddington v. Abernethy*, (p) there was little judicial authority on the point; and, perhaps, even now, the question must be decided rather upon principle and analogy, than on express and satisfactory adjudication. Several obscure *dicta*, and even decisions, (q) are to be found in the old Reports, but they are too vague and contradictory to admit of a clear rule being deduced from them. (r)

(o) The affirmative view is supported by Fearné Cont. Rem. 276; Lex Cust. 120, 121; Cru. Dig.; Sanders' "Surrenders of copyhold property considered with reference to future and springing Uses." Burt. Elem. Comp. 424. In favour of the negative view are, 1 Wath. Copy. 197, *et seq.*; 1 Scriv. Copy. 195, *et seq.*; 1 Prest. Abst. 141, 2 ib. 34; Gilb. Ten. 260, *et seq.*; Gilb. Uses and Tr., and note by Sugden.

(p) 5 B. & Cress. 776. 8 Dowl. & Ry. 626.

(q) *Allen v. Nash*, Noy. 152; Brownl. 127. *Paulter v. Cornhill*, Cro. Eliz. 361. *Bentley v. Delamoor*, 1 Freeman, 267. *Edwards v. Hammond*, 3 Lev. 132; 2 Show. 396. *Simpson v. Sothorne*, 2 Bulstr. 272; Cro. Jac. 376; 1 Roll. Rep. 109, 137, 163; Godb. 264; 2 Roll. Ab. 791.

(r) The following extract from Lord Coke's Copyholder deserves introduction in this place:—"In customary grants upon surrenders, the law is not so strict as on grants at the Common law. If the grantee be not *in rerum natura*, and able to take by virtue of the grant, presently upon the grant made, it is merely void: But in customary grants upon surrenders the law is otherwise; for

though, at the time of the surrender, the grantee is not *in esse*, or not capable of a surrender; yet if he be *in esse*, and capable, at the time of the admittance, that is sufficient; and, therefore, if I surrender to the use of him that shall be heir to I. S., or to the use of I. S.'s next child, or to the use of I. S.'s next wife; though at the time of the surrender, I. S. had no heir, child, or wife; yet, if, afterwards, he hath a child, or taketh a wife, his heir, his child, or his wife may come into the court and compel the lord to admit according to the surrender. So, if I surrender to the use of him that shall come next into St. Paul's after such an hour; whose fortune soever it is to come first, the lord must admit him, and I shall never avoid it. The same law is, if I surrender to the use of him that I. S. shall nominate, or that I myself shall nominate to the lord at the next meeting. The reason of the law is this: A surrender is a thing executory, which is executed by the subsequent admittance, and nothing at all is invested in the grantee before the lord hath admitted him according to the surrender; and, therefore, if at the time of the admittance, the grantee be *in rerum natura*, and be able to take, that will serve. Besides, in customary grants the in-

Lord Chief Baron *Gilbert*, in his *Treatise on Tenures* (s), considers that the limitations in question are inadmissible, upon the ground, that the Use upon a surrender of copyhold is not like a Use, or Trust, declared of freehold, for that he who is admitted upon a surrender, is admitted to the legal customary estate, and is not seised to a Use, and that, therefore, Uses upon surrenders are in general governed entirely by the same rules as conveyances at Common law, in which such limitations were not allowable. The general argument upon which the invalidity of Springing and Shifting Uses, as applied to copyhold estates, is grounded, is, that customary surrenders are to be construed in all respects as conveyances at Common law (t); and that as such limitations would have been void in a feoffment before the statute 27 Hen. 8, and that statute does not extend to

Arguments on which their applicability to copyhold estates is rested.

tent of the grantor is more respected than it should be by the strict rules of law; which appeareth by this, that if a surrender be made of a copyhold to the use of a last will, and the surrenderor deviseth it unto two, the one is admitted according to the purport of the will, this shall inure to both." And afterwards, in the same section, occurs the following:—"But though the surrender be a thing executory, and the intent of the grantor so much favoured; yet if a copyholder will surrender to the use of the right heirs of J. S., he being alive, this is void, because it cannot take effect according to the intent of the grantor, for he would have the grant to be executed presently, which cannot be, in regard that J. S. can have no heir till after his death." Mr. Serjeant *Scriven*, (1 Treat. Copy, 205,) considers the latter position of Lord *Coke's*, as clearly showing, that he did not mean in the former paragraph to lay down a general rule, that Uses *in futuro* can be

limited in customary surrenders. But, with all deference to that learned writer, it is conceived, that the position in question merely refers to the old and nearly obsolete distinction between limitations *per verba de presenti* and *per verba de futuro*, (*vide infra*, cap. 9,) and is in no way repugnant to the general doctrine previously laid down by Lord *Coke*, that Uses *in futuro* are valid in surrenders of customary lands, when capable of taking effect at the time of admittance. This view is confirmed by Lord C. B. *Gilbert's* *Treatise on Tenures*, where (p. 264) it is said, "A copyholder surrenders to the use of the right heirs of J. S., he being alive; void; for it cannot take effect *in presenti*, as he would have it." And one of the authorities cited in the margin of *Gilbert*, is the latter of the extracts above given from Lord *Coke's* Copyholder.

(s) Pp. 260, 262.

(t) 1 Scriv. Copy. 182, 195, 213,

Uses declared of copyholds, Springing and Shifting Uses must necessarily be void in surrenders of copyhold estates (*u*).

The reasons urged in support of a contrary view.

On the other hand, it is said, that the rules of the Common law, prohibiting the grant of a freehold *in futuro*, and of a fee upon a fee, were grounded upon the principles, that a vacancy or abeyance must never exist in the tenure; and that a freehold could only be defeated by entry of the feoffor or his heirs, for a condition broken; which reasons are, it is alleged, inapplicable to the case of copyhold estates; the freehold of which constantly resides in the lord, and in the case of contingent remainders, prevents their destruction by the alienation or other act of the tenant for life (*v*). It is further argued, that as limitations analogous to Springing and Shifting Uses, are allowed in wills of copyhold estates (*w*), which operate only as declarations of the Uses of previous surrenders (*x*), there can be no reason for refusing validity to the like limitations in other surrenders (*y*): that customary surrenders in many respects differ from conveyances at Common law, as well in their effect, as in the construction put upon them: and that Uses limited on surrenders of copyholds are more to be assimilated to Uses arising out of the seisin of a feoffee under a feoffment since the statute of Hen. 8; between which there is, in fact, no substantial distinction (*z*).

The case of *Boddington v. Abernethy*.

The case of *Boddington v. Abernethy*, above-mentioned, was one sent from Chancery to the Court of Banc. Reg., and arose upon the execution of a *Power of Sale*, reserved to trustees over freehold and copyhold estates in a marriage settlement; with which was connected a Power to

(*u*) 1 Scriv. Copy. 211.

(*v*) Sanders' "Surrender of Copyhold Property, &c." Argument in *Boddington v. Abernethy*, 5 B. & C. 776.

(*w*) *Brian v. Cawson*, 3 Leo. 115. *Wellock v. Hammond*, Cro. Eliz. 204. S. C. sub nom. *Wellocks v. Ham-*

mond, cited 3 Rep. 20 b.

(*x*) That is, as to all wills not governed by the provisions of 1 Vict. c. 26.

(*y*) Argument in *Boddington v. Abernethy*, *supra*.

(*z*) Sanders' "Surrender of Copyhold Property, &c."

revoke and defeat the *Uses* and estates limited by the settlement, and to appoint the property to a purchaser. The Court, by its certificate, decided, that there was a good title under the exercise of the Power vested in the trustees.

Now, as every Power of revocation and new appointment operates, when executed, to some extent as a Shifting or Springing Use (a); it would, at first sight, seem, that in the case of *Boddington v. Abernethy* was involved the whole question of the validity of Springing and Shifting Uses limited in surrenders of copyholds; and, accordingly, the argument was mainly conducted upon this assumption. But there is a circumstance in the case, which, unfortunately, deprives it of much force as a judicial decision on the merits of the controversy under consideration. The tenant for life under the settlement was admitted to the copyhold in the usual way; the trustees executed their power of revocation, and appointed the property to the purchaser; afterwards, the tenant for life *surrendered to the trustees, who were admitted in fee, upon the trusts of the settlement; and then they surrendered to the purchaser, who was admitted.* It is manifest, therefore, that, assuming the trustees by their admittance acquired the legal *fee*, the purchaser's title was perfectly consistent with the doctrine, that Powers of revocation and appointment cannot be executed so as of themselves to divest legal customary estates (b); for as to *equitable* or beneficial interests in the fee, of course, there is no question that a Power having a divesting effect is perfectly good. As, however, this view of the case was not taken in the argument, and the judges (in accordance with the usual practice) did not assign their reasons for the certificate sent, it is impossible to say, how far the particular circumstances mentioned may have influenced their decision.

Observations
upon *Boddington v.*
Abernethy.

Mr. Serjeant *Scriven* (who has entered into a lengthened Mr. Serjeant

(a) *Vide supra*, p. 61.

(b) See 1 *Scriv. Copy.* 229.

Scriven's opinion on the effect of *Boddington v. Abernethy*, assailed.

and ingenious argument to prove that Springing and Shifting Uses are, both on principle and authority, invalid in surrenders of copyhold estates) seems to consider, (c) that even supposing the decision in the case of *Boddington v. Abernethy* to amount to an affirmance of the position, that the exercise of Powers of revocation and appointment will divest legal customary estates, yet still it cannot be regarded as an authority, that Springing and Shifting Uses declared of such estates are equally effectual. Such a notion, however, is, it is submitted, subversive of all the established rules and principles in relation to future Uses; which regard a Power of revocation and new appointment as but another and less direct form of limiting Uses to divest prior estates already vested, or which would otherwise take effect; or, in other words, one class of Shifting Uses.

Suggestion as to the probable nature of the ultimate decision of this question.

But whatever be the exact extent of the decision in *Boddington v. Abernethy*, it may confidently be affirmed, that it evinces an inclination on the part of our Courts of law to allow the same modes of limiting Uses in customary surrenders, which prevail in assurances of freehold estates; and, notwithstanding the contrary opinion entertained by the learned author above-quoted (d), it is, with all due respect, conceived, that whenever the subject shall call for a full and direct adjudication, that inclination will assume a shape more definite and unequivocal (e).

(c) 1 Scriv. Copy. 225.

(d) 1 Scriv. Copy. 202.

(e) A fitting opportunity seems to occur for the introduction of a learned note of Mr. Butler's, in his edition of the *Essay on Contingent Remainders*, p. 381, et seq.; in which he presents a luminous view of the progress of the law of limitations of estates, prior and subsequent to the passing of the Statute of Uses. "1st, What future estates and interests in real property were allowed by the Common law,

and some of the rules of the Common law respecting them. 2ndly, The first admission of conditional limitations as trusts in equity, and in legal devises of land. And, 3rdly, Their introduction as legal estates in consequence of the Statute of Uses. 1st, As to the future estates and interests in real property which were allowed by the Common law;—it is generally understood that lands were granted originally for the life only of the grantee, then to him and his lineal

CHAPTER VII.

OF THE NATURE AND ORIGIN OF EXECUTORY DEVISES AND BEQUESTS.

IT is here proposed to consider certain testamentary limitations, of a character similar to Springing, Shifting, and Future Uses, but not, like them, operating immediately or

heirs, and then to him and his lineal and collateral heirs; and that on every such grant, whether it were for life or in fee, a right remained in the grantor to the services of the grantee, during the continuance of his estate, and to a return of the land on its expiration. Whether this right of the grantor depended on an estate for life or in fee, it was of the same nature, and indifferently called his *Reverter* or *Escheat*; but, from the remoter probability of the return, when the fee was granted, it became customary to call it, after a grant of the fee, his *Possibility of Reverter*. By degrees, that expression was applied to those cases only, where a limited fee had been granted, and the word "escheat" was applied to those where the grant had conferred an absolute estate in fee-simple. A grant to a man and the heirs of his body was, at Common law, a limited fee; and, therefore, after such a grant, a possibility of reverter was said to remain in the grantor. When the statute *De donis* converted such fees into estates tail, the return of the

land was secured by it to the donor, and was called his *Reverter*. In all these cases, the words *Reverter* and *Reversion* are synonymous.

"After a general power of alienation was allowed, the owner of the fee might either grant the whole fee, or a limited fee carved out of it, or an estate for years, for life, or in tail. If he granted a limited fee, the possibility of reverter on the determination of the limited fee continued in him; but being a mere possibility, it could not be granted. If he granted an estate for life or in tail, the estate so granted was called a *Particular-Estate*; and having granted one such estate, he might grant over ulterior particular-estates at his pleasure. Those being carved out of that portion of the fee which remained in the grantor after his grant of the first particular-estate, were called *Remainders*. From their nature they necessarily waited the regular expiration of the preceding particular-estate or estates, for their falling into possession. The only other future interest in real property

necessarily under the Statute of Uses, denominated *Executory devices* and *bequests*; the former of which, as may be

which was known to the Common law, was a *right to enter on the breach of a condition*. According to the law of tenure, the performance of the services was a condition annexed to every grant. If the tenant neglected to perform the services, the grantor might enter and resume the tenement. Whether this condition were expressed or not, it was considered to be inseparably incident to the estate of the grantee. At first, it was the only condition that could be annexed to the grant of land; afterwards, other conditions were occasionally introduced, and, by an application, in some respects, very much forced, of the original principle of conditions, that, on their non-performance, the grantor might resume the land, conditional fees at Common law, and some other modifications of landed property, were introduced, as estates upon condition. These were often of such a kind as to make it more natural that a stranger should have the land upon the non-performance of the condition, than the grantor; and that the grantor, instead of being confined to his right of resumption, should have it in his power to compel the performance of the condition, or recover from the grantee a compensation or satisfaction for the breach of it: but, as all these estates were considered to be estates upon condition, the law still confined the donor's remedy to the resumption of the estate, and confined that remedy to the donor and his heirs.

"When the grantor entered for the breach of the condition, he was considered to be in, as of the seisin of his former estate: it was the same when the heirs of the grantor entered; they were supposed to be in, as of the seisin of the ancestor. The entry defeated

the livery by which the grant was made, and by a necessary consequence defeated all the estates which depended upon that livery. Thus, if a feoffment were made to one for life, or in tail, upon condition, with remainders-over, and the grantor or his heirs entered for a breach of the condition, the first estate and the remainders-over were equally destroyed; and the grantor or his heirs were considered to be in, as of the former seisin.

"Such, before the Statute of Uses, were the legal modifications of real property in respect to future estates, interests, and rights. It is evident, that such modifications of real property as are now produced by executory devices and conditional limitations, would not, before the passing of that statute, have been allowed by the Courts of law. If, before that time, land had been conveyed to A. and his heirs, with a proviso, that if A. should not leave any child of his body living at the time of his decease, the land should go over and belong to B. and his heirs; it is obvious that the limitation to B. must be legally void. It could not be a grant of the reversion, as the old fee was previously granted; or a grant of a remainder, as it was preceded by no particular estate; it could not confer a title on B. to enter for a condition broken, as such a title of entry could only belong to the grantor or his heirs; and escheat was wholly out of the question. If the conveyance had been to A. for life, with remainders-over, with a proviso that if B. attained twenty-one in the lifetime of A., the land should immediately thereupon devolve to B. and his heirs, the consequences would have been the same, and the limitation to B. would have been liable to all the objections

supposed, concerns real estate, and the latter, chattels real and personal. Of each of these in their order.

suggested. At first sight, it might, perhaps, seem, that the limitation to B. and his heirs might be supported as a remainder expectant on A.'s estate for life; but on further examination it would appear that the limitation to B. and his heirs wanted the distinctive quality of a remainder,—that its vesting in possession should depend upon, and wait for the regular expiration of the preceding estate; for in the supposed case, the vesting of A.'s estate in possession would not depend on the decease of A., the natural term for the expiration of the preceding estate, but would vest in possession on B.'s attaining twenty-one in the lifetime of A. It would not, therefore, wait till the expiration, but would take effect during the continuance, and operate to the destruction of A.'s life estate. Thus, both the limitations proposed, were, before the Statute of Uses, legally void.

2. There appears, however, some reason to suppose, that though conditional limitations were legally void, they were allowed in the modification of Uses, while *Uses remained in their fiduciary state* at the Common law. In that state, the Courts of law could not notice Uses; but it was considered that the owner of the land charged with them, was under a moral obligation of disposing of the land, and the rents accruing from it, in conformity to the Use, and, therefore, if the Use limited the beneficial interest of the lands in the manner suggested, the legal owner of the land was bound to dispose of it accordingly. Thus, such limitations, though void at law, became good as trusts in equity. It is also probable that under the *custom of devising lands*, as it prevailed in London, and some other places, these modifica-

tions of property were sometimes attempted, and from the liberality which our Courts have always adopted in the construction of wills, were often allowed.

3. *After the passing of the statute of 27 Hen. 8*, which converted Uses from their fiduciary state at the Common law, into legal estates, it became incumbent on the Courts to determine what effect that statute should have, in respect to the executory limitations under consideration. When the case was first pressed on the Courts, it should seem to have been necessary for them to consider, whether the statute executed any modifications of property made through the medium of Uses, which the Courts of law would have held illegal, if they had been made of the lands themselves, in conveyances at Common law. So far as respects the modifications of property in question, the Courts held them to be executed by the statute, and thus made them a part of the English law of real property. Comparing them with remainders and titles of entry for a condition broken, they appear of a mixed nature, partaking in some measure of the nature of each. They so far partake of the nature of a remainder, that when the event upon which they are to have effect, takes place, the estate or interest created by them, passes to a stranger; and they so far partake of the nature of a title to enter for the breach of a condition, that when the event proposed takes place, they operate to defeat the preceding estate. When the Uses raised by them, arise from an event provided for by the deed or will which creates them, they are called *Conditional Limitations*, *Secondary*, *Future*, *Springing*, or *Shifting Uses*, or *Executory devises*, accord-

Definition of
an Executory
devise.

An Executory devise has been defined to be, (b) "a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder;" a definition which, though concise, comprehends every class of limitations of this nature. It is a species of limitation by will nearly answering to the system of Springing, Shifting, or Future Uses, declared in instruments *inter vivos*; although, as we shall hereafter see, estates may sometimes be created through the medium of Executory devise, which would not be admissible in deeds, even by way of Use.

Mr. Fearn's
distribution of
Executory de-
vices.

The learned author of the *Essay on Contingent Remainders* has distinguished (c) Executory devises into two kinds. The first is, when the devisor parts with his whole fee-simple, but upon some contingency qualifies that disposition, and limits an estate on that contingency. The second class is, where the devisor, without parting with the immediate fee, gives a future estate to arise either upon a contingency or at a period certain, unpreceded by, or not having the requisite connection with, any immediate freehold to give it effect as a remainder. This distribution being meagre and deficient, the author of the *Essay on Abstracts* has classified (d) Executory devises more minutely, and distinguished them into six kinds. They are the following:— 1st (agreeing with the former of Mr. Fearn's two classes); When an interest is limited in contingency to take effect eventually and in derogation and abridgment of a previous estate in fee. 2ndly; When the testator gives a future interest of freehold to arise either on a contingency, or at a time certain, but does not part with the immediate fee, or limit any immediate freehold. 3rdly; When the testator

And Mr. Pres-
ton's.

ing to the nature of the event on which they are limited, and the instrument which creates them. When they arise from the act of some agent or person whom the instrument authorizes to raise or appoint them, they

are said to arise by an execution of a Power."

(b) 1 Jarm. Wills, 778.

(c) Pp. 399, 400.

(d) Vol. 2, p. 124, *et seq.*

gives a future freehold interest to take effect in possession after, and in subordination to, a particular-estate of freehold ; but the estate of freehold must necessarily determine before the remote interest can come into its place. 4thly ; When a particular-estate, as distinguished from the fee, either with or without a disposition of the fee, is given by will, and there is a devise in the same will, to take effect in derogation and abridgment of that estate, before the period of its regular determination. 5thly ; When an estate-tail, or an estate in fee-simple is, in some event, reduced to an estate for life, or other less estate. 6thly, and lastly ; When an estate is limited in derogation of a preceding estate, either of inheritance or freehold, and in *partial*, though not total, exclusion of the same.

Now, no one of these classes of limitations can, “ consistently with the rules of law, take effect as a remainder ;” and in order to prove this, it will be proper to afford a practical illustration of each kind.

A limitation to A. and his heirs, and if he die under the age of twenty-one years, then to B. and his heirs, is an example of the first kind of Executory devise. Here, the gift to B. would be void by the rules of the Common law ; which will not allow of any limitation after the grant of a previous fee-simple.

Limitation to A. and his heirs, and if he die under twenty-one, to B.

A devise to the heirs of J. S., who is living (and during whose life, therefore, no heirs are ascertainable, by the rule, *nemo est hæres viventis*,) or a limitation to A. and his heirs, at the expiration of seven years from the testator's death, are instances of the second class ; in each of which there is a violation of the ancient Common law rule, that an estate of freehold cannot be created to commence *in futuro*.

Limitation to the heirs of J. S., (during his life,) or to A., at the expiration of seven years.

And, so, if a devise were made to A. for life, and after his decease and one day, or one year, or other superadded period, to B. ; B. would take by Executory devise of the third kind. In this case, it is impossible for the limitation to B. to take effect as a Remainder, because it is a rule of

Limitation to A. for life, and after his decease and one day, to B.

the Common law, that a remainder must always vest either during the continuance of the particular-estate, or at the very instant of its determination, whereas, in the case supposed, a certain period must *necessarily* elapse, between the determination of the particular-estate and the time fixed for the ulterior limitations vesting in possession.

Limitation to A. for life, provided that on C.'s return from Rome, B. to take.

Again, if property were devised to A. for life, provided that when C. returns from Rome, it shall thenceforth immediately be to the use of B. in fee, B.'s estate takes place as an executory devise of the fourth sort. The limitation to B. would be void as a remainder at Common law, (e) because it is an invariable rule that every remainder must be so limited as to wait for the regular determination of the particular-estate, before it takes effect in possession, and not to prejudice or exclude the preceding estate. In the case put, should C. return from Rome in the lifetime of A., A.'s estate is immediately to cease, and B.'s to vest in possession at once; whereas, by the rule just stated, as a remainder, it must await the natural expiration of the particular-estate in A.

Limitation to A., B., and C., in fee, and on either marrying, then to such one for life only.

Further, if an estate be limited (f) to A., B., and C., testator's daughters in fee, provided that if either of them marry without the consent of their mother, or other person, then the daughter so marrying without consent, to have only an estate for life in the land devised, the substituted limitation for life is an executory devise of the fifth class. At Common law, all such modifications and alterations of estates are unknown; a vested estate being voidable only by conditions, which are available to none but the testator's heirs; and future limitations being valid only by way of remainder, expectant upon, and to take effect on the regular determination of, the prior estates.

Limitation to

And, lastly, (g) a devise to A. in fee, provided if B. returns

(e) Plowd. Com. 29 b. 2 Leo. 16.

Co. Litt. 203 b, and note by Harg.

(f) *Wright v. Wright*, 1 Ves. sr. 409.

(g) *Hambury v. Cockrell*, 1 Roll.

Abr. 835; and see 2 Prest. Abst. 140;

1 Jarm. Wills, 782, 783.

from Rome within a certain time, then to B. for life, is an instance of the sixth kind of Executory devise. Here, the fee in A. is not wholly defeated in the event of B.'s return from Rome within the required period, but only to the extent of a life-interest being taken out of that fee, for the benefit of B. In the particular point of its violation of the rules of the Common law, the case resembles the first, fourth, and fifth kinds of Executory devise.

A. in fee, and if B. returns from Rome, to him for life.

To one or other of these several classes, all limitations by way of Executory devise will be found to belong; but under *none* will any limitation be allowed to rank, unless it possess the uniform characteristic of all the examples before put; viz., *the impossibility of its taking effect as a remainder under the rules of the Common law*. There is no rule more clearly settled than this, and none which the Courts of Justice have more firmly adhered to, even when by that adherence plain intentions have been frustrated, and whole settlements overturned. It will not suffice as an argument for any particular limitation operating as an Executory devise, that such limitation is *liable* to destruction, or may *probably* never take effect as a remainder at Common law: to enable it to operate as an Executory devise, there must be an *absolute necessity* for it so operating, in order to its ever having effect at all.

Characteristic of all these limitations,—impossibility of their taking effect as remainders at common law.

Having thus ascertained the general nature of limitations by way of Executory devise, and the various classes into which they divide themselves, it will now be proper to inquire briefly into the character and time of their origin.

Origin of Executory devises.

It is to the combined operation and effect of the Statutes of Uses and Wills, that the introduction and establishment of Executory devises have generally been attributed. But we will first see what light the old Year Books throw on the inquiry; for there are some obscure cases and *dicta* to be found in those Books which seem to afford glimpses of testamentary limitations in the nature of Executory

devises, in much earlier times than those in which the statutes referred to were enacted. (*h*) And of this opinion seem to have been two or three of the judges who decided an important case on the subject of Executory devise, which occurred in the reign of James the First; for it is there said, that Executory devise, determining the fee in one person on a contingency, and raising the fee up in another, had always in some respect prevailed.

Probable that they may have occurred under the customary power of devising, which obtained prior to Statutes of Wills.

Under the customary power of devising which had obtained in some places, it is not improbable that testamentary dispositions of the kind under consideration may have been occasionally attempted; but only as thus restrictively understood, can the notion of the existence of Executory devises prior to the Statutes of Wills be entertained. Thus, we find it laid down by *Littleton*, (*i*) that, "by custom, a man may devise by his testament that his executors may alien and sell the tenements that he hath in fee-simple, for a certain sum to distribute for his soul; in this case, though the devisor die seised of the tenements, and the tenements descend unto his heir, yet the executors, after the death of the testator, may sell the tenements so devised them, and put out the heir, and thereof make a feoffment and estate by deed, or without deed, to them to whom the sale is made." *Gowdchep's case*, in 49 Edw. 3, fol. 16, is to the like effect; and, indeed, it is most probable that that case formed the authority for *Littleton's* position. Another case in the Year Book of 11 Hen. 6, fol. 13 *b*, is also an instance of devise resembling the case in *Littleton*, with the difference, that the sale directed, was for the purpose of paying the testator's *debts*. Another case also, in the same Year Book, occurs, of a devise, under a special custom, to issue *en ventre sa mère*, which was, obviously, a devise to commence *in futuro*, and, therefore, could only be allowable

(*h*) 2 Hargr. Jurid. Arg. 28.

(*i*) Co. Litt. 112 *b*, 113 *a*.

(as well as the cases of testamentary powers just mentioned) as dispositions by will, taking effect under some rule of law analogous to that of Executory devise. (*k*)

These are the only examples of Executory devise of land discoverable prior to the reign of Henry 8; and much doubt is thrown over *them*, by the case of *The Prior and Convent of St. Bartholomew*, Dyer, fol. 33 *a*, p. 12 (*l*), adjudged in the interval between the Statute of Uses and the first Statute of Wills. The case arose on a devise in fee, to the prior and convent of St. Bartholomew, paying yearly to the dean and chapter of St. Paul's, sixteen marks, and, in default, their estate to cease, and the dean and chapter and their successors to have it; and the judges, *Fitzherbert* and *Baldwin*, held it not allowable to limit a fee upon a fee. Lord Chief Justice *Vaughan*, in the reign of Charles 2, (*m*) considered this case in *Dyer* as amounting to a decision, that Executory devises were unknown to the ancient Common law. His words are:—"This way of Executory devise after a fee-simple of any nature, was in former ages unknown, as appears by a case in the Lord *Dyer*, 29 Hen. 8, concerning a devise to the prior and convent of St. Bartholomew, by the clear opinion of *Baldwin* and *Fitzherbert*, the greatest lawyers of the age." And so, again, it is said in the case of *Roe v. Flud*, Pasch. 2 Geo. 2; Fort. 184;—"Executory devise began soon after 29 Hen. 8."

Different conclusion furnished by case of *Prior and Convent of St. Bartholomew*.

Notwithstanding, therefore, the cases cited above from the Year Books, there is, perhaps, upon the whole, little ground for assuming any intelligent approval to have been given to limitations by way of Executory devise, prior to the period when the general power of devising was conferred by the Statutes of Wills. For the extreme rarity of testamentary dispositions of real property (otherwise than

Not much importance to be attached to the instances of Executory devise prior to reign of Hen. 8.

(*k*) 2 Harg. Jurid. Arg. 29.

(*m*) *Sheldon v. Gardiner*, Vaughan,

(*l*) And see 1 Eq. Ab. 186, pl. 3. 271.

through the medium of Uses, and of such devises we are not here speaking,) will show, that though limitations in wills in the nature of Executory devises may have been sometimes attempted, and even tacitly allowed, there can have been little occasion for that strict inquiry into their legality, which alone could entitle any supposed decision to weight or consideration.

Origin of
Executory de-
vises to be
attributed to
the combined
operation of
the Statutes of
Uses and
Wills.

It being, as we have seen, the chief effect of the Statute of Uses to introduce limitations of estates unknown to the Common law, by reason of its transferring the possession to the Use, "after the form and manner of the Use," it was reasonable to suppose, that limitations admitted by the doctrine of Uses would be allowed under the new power of devise conferred by the statutes of 32 and 34 Hen. 8. Not, indeed, that it was or is clear that the operation of the statute of 27 Hen. 8, necessarily extended to Uses limited in Wills; for this has been always, and is still, a disputed question; and, if regard be had to the weight of authority (n) and argument, it would even seem, that Uses declared in wills are not executed by the statute. Practically, however, the subject is of little moment, for the testator's *intention* (the pole-star, as it were, for judicial guidance in the construction of wills) in all cases determines where the legal estate shall reside, and the Uses are executed or not, according as that intention will be best served. (o) But the point for our consideration is, that the Statute of Uses having legalized limitations in deeds void by the rules of the Common law, it was an almost necessary consequence, that the same indulgence should be extended to testamentary dispositions, under the Statute of Wills, which, in terms, authorized the devise of real estates, "at the free will and pleasure" of the devisor. Thus, Mr. *Hargrave* has observed, (p)—"That inheritance

(n) Booth's opinion in Sheph. Touchst. Harg. n. to Co. Litt. 271 b, n. 1, s. iii. 5.

Tr. 356, n., and authorities there cited.

(p) 2 Jurid. Arg. 31.

(o) *é contrà*, Sugd. Gilb. Uses and

should begin to be subject to Executory devise, may be accounted for from the progress of Uses and Trusts after the Statute of Uses, 27 Hen. 8, and from the effect produced by the power of devising land under the statutes of 32 and 34 of the same reign; Springing Uses of the inheritance and freehold furnishing a precedent for like executory estates in the form of Executory devise; and the construction of the statutory power of devising at the free will and pleasure of the testator, affording to the judges an opportunity of exerting a discretion in favor of Executory devise, accordingly." And so, Mr. *Preston*, (g)—"Executory devises incontrovertibly owe their origin to the learning of Uses, and particularly to the doctrine of Springing or Shifting Uses, and are deducible from that learning." And, again, Mr. *Butler*, (r)—"It is evident that such modifications of real property as are now produced by *Executory devises* and conditional limitations would not, before the passing of that statute," (meaning the Statute of Uses,) "have been allowed by the Courts of law." But the same learned writer afterwards countenances the supposition, "that under the *custom of devising* lands, as it prevailed in London and some other places, these modifications of property" (speaking of limitations analagous to Springing and Shifting Uses in deeds) "were sometimes attempted; and, from the liberality which our Courts have always adopted in the construction of wills, were often allowed."

Upon the whole, we may observe, in reference to this part of our subject, that, though distinct in their respective origins, Springing, Shifting, and Future Uses and Executory devises may yet be regarded as, in some manner, connected, as well in respect to the period of their first recognition and establishment, as in their principles and tendencies. That they have always been considered to be thus closely allied,

Conclusion,—that Springing, Shifting, and Future Uses and Executory devises are connected in their respective origins.

(g) 2 Essay on Abst. 140.

(r) Note to F. C. R. 381.

is manifest, from the identity of the rules which govern both classes of limitations, in reference to the law of perpetuity.

It remains to give a short account of the authorities by which the validity of Executory devises was established.

First cases
establishing
Executory
devises after
Statutes of
Wills.

The first case after that of the *Prior and Convent of St. Bartholomew*, before-mentioned, in which the question of the validity of an Executory devise arose, was one (s) in the reign of Philip and Mary, reported in *Dyer*; but nothing more than an inference can be deduced from it, in relation to the subject before us. It was the case of a devise on the contingency of the death of the testator's heir under twenty-four; and the question arose on an action of debt, in which the point of the heir being entitled by descent or devise was raised. It was held that this devise did not prevent the descent to the heir, *as he had attained his age of twenty-four*, which, as Mr. *Hargrave* remarks, (t) "rather implies, that if he had died before, the devise might have operated." In the succeeding reign of Elizabeth, several cases occurred, by which the legality of Executory devises was completely established. Not to mention *Boulton's case* (u) in the 6 & 7 Eliz., (in which, the opinion expressed in favor of an executory devise seems to have been extra-judicial, and is differently reported,) we may refer to the cases of *Wellocke v. Hammond*, (v) *Fulmerston v. Steward*, (w) *Hinde v. Lyon*, (x) and *Hoe v. Gerils*, (y) all of which were decided in the reign of Elizabeth, as, in different degrees, affirming the principle, that "in a devise, it may well be, that an estate in fee shall cease in one, and shall be transferred to another." The decision to which we may refer as most satisfactory, because apparently made after full and solemn consideration of the subject, in all its bearings, is that

(s) *Dyer*, fol. 124 a. pl. 38.

(t) 2 *Jurid. Arg.* 31.

(u) Cited 2 *Ro. Rep.* 217.

(v) *Cro. Eliz.* 204; 3 *Rep.* 20 b.

(w) Cited in *Cro. Jac.* 592.

(x) 2 *Leo.* 11.

(y) Cited *Palm.* 136.

made in the case of *Pells v. Brown*, (z) which occurred in 18 James 1. The case was: *William Brown* devised lands to *Thomas Brown*, his second son, and his heirs for ever, and if *Thomas* should die without issue, living *William* his brother, that then *William* should have the devised lands to him and his heirs and assigns for ever. This limitation to *William* was solemnly adjudged to be a good Executory devise, by all the judges of B. R. It has before been remarked, that in this case reference was made to the fact of Executory devises having always been allowed, and the judges appear to have attached great importance to this circumstance; although, as we have before seen, this notion of the antiquity of Executory devise must be received with limits. It is further manifest, from Lord *Coke's* arguments in *Manning's* case, (a) in 7 James 1, (which was the case of an Executory devise of a term for years, and will be referred to more particularly when we come to speak of those limitations) that Executory devises of the fee were then well established. His words are,—“One may devise an estate by his last will in such manner that he cannot do by any grant or conveyance in his life. As if a man seised of land holden in socage, devise that if A. pays such a sum to his executor, that he shall have the land to him and his heirs, or in tail, or for life, &c., and dieth; and afterwards A. payeth the money, he shall have the land by this Executory devise, and yet he cannot have it by any grant or conveyance executory at the Common law; but it well standeth with the nature of a devise.”

The authorities hitherto mentioned in reference to the legality of Executory devises of inheritance have been those in which such limitations have operated to divest or defeat a preceding estate in fee, and to transfer it to another on a specified event. But the validity of Executory devises of freeholds to commence *in futuro*, was settled almost con-

(z) Cro. Jac. 590.

(a) 8 Rep. 95.

temporaneously with that of the other class of such limitations. Thus, where (b) one devised lands to J. S. from Michaelmas following, for five years, remainder to the plaintiff and his heirs, and the testator died before the ensuing Michaelmas; it was agreed, that the limitation to the plaintiff could not vest *eo instanti* that the particular-estate (by which we must suppose to be intended the fee of the testator) determined, because of the term for years, but being in a will, it was held good as an Executory devise. So, where (c) lands were devised to B. in fee, to commence and take effect six months after the testator's death, it was adjudged to be a good Executory devise. And, again, (d) a devise to an infant *en ventre sa mère* was held a good Executory devise of this kind; for, until the birth, the devise does not take effect, but the land descends to the heir in the meantime. And, so, Lord Chief Justice *Vaughan* remarks, (e) that "if a devise be to commence at a time after the testator's death, and there is no devise to any one, so that it descends to the heir in the mean time; this takes effect as an Executory devise, for it cannot be a remainder, there being no particular-estate on which it depends."

Thus have we seen the nature and operation of Executory devises of inheritance, their rise and origin in the combined effects of the Statutes of Uses and of Wills, (f) and the gradual but complete establishment of their legality in the reigns of Elizabeth and the first James. We will conclude these inquiries with the forcible observations of Mr. *Hargrave*, made after a like summary view of the law of Executory devise: (g)—"Executory devise appears to be not a genuine ancient branch of our law, but an *indulged super-induction* to it; not a *regular production* of our general

General
character and
mode of
operation

(b) *Pay's case*, Cro. Eliz. 878. 2 Mod. 9. 1 Salk. 229.
Noy. 43.

(c) *Clarke v. Smith*, 1 Lutw. 798.

(d) 1 Frem. 244. 1 Wils. 206.

(e) *Vaughan*, 269.

(f) 2 Harg. Jurid. Arg. 31.

(g) 2 Harg. Jurid. Arg. 54, 55.

system, but an *excrecence*; not a *strictly regular species of entail*, but a *permitted irregular mode of settlement*; not a *legitimate offspring of our Common law*, but a *privilege gradually insinuated into our jurisprudence*. It operates by creating future estates and interests of every kind, freehold as well as chattel, in a way not endured by our Common law;—in a way quite inconsistent with the solemnity of its forms as to freehold;—in a way which, without the rules, the Courts of Westminster Hall have, by an exercise of discretion, introduced to circumscribe this mode of creating estates, would have afforded the opportunity of making inheritance and freehold and chattel almost ever precarious, uncertain, and determinable, and consequently of making property almost eternally unalienable.” And, in allusion to the rule, before referred to, against construing any estate as operating by Executory devise, when it can take effect by remainder, the same gentleman says,—“Whilst this priority or precedence of remainder continues, so long there will exist a badge, not only of the juniority of Executory devise, but of the disfavour of our law towards it, and of its being an indulgence.”

Having disposed of Executory devises of inheritance, we will now proceed to consider Executory *Bequests* of terms for years and chattels personal; which have been reserved for separate consideration, not so much on account of any important distinction between them and Executory devises; for in some respects there is much mutual resemblance; but because the inquiry seems properly to divide itself, according to the different natures of the subject-matter of the limitations. And, first, as to Executory bequests of *terms for years*. Estates for years were anciently regarded by the Common law as interests in land, of very little consequence, and the termors were considered rather as the bailiffs or servants of the lord, than as persons having any property of their own. (h) The terms granted were, for

of executory devises.

Executory bequests of terms for years.

Ancient inferiority of terms of years.

(A) 2 Bl. Com. 141, 142.

the most part, short, and the estate of the lessee was also very precarious; for it was in the power of the tenant of the freehold to defeat it by a common recovery. But, whatever the length of the term, the law always regarded it as inferior to a freehold interest, because the former was to endure for a time certain and limited; whereas the essential characteristic of a freehold, was, uncertainty and possible duration beyond the longest term.

Afterwards considered of more importance.

When, at length, however, the interest of the tenant was rendered more secure and permanent, by depriving the freeholder of the power of destroying the term by means of a recovery, and the general convenience of estates for years became more apparent, they were esteemed of greater importance; and long terms began to be extensively introduced, although their inferiority to freehold estates still remained.

Former rule, that the bequest of a term for life was a bequest of the whole term.

When long terms for years first began to be made the subjects of testamentary disposition, the rule was, that, if a term was devised to one for life, and, after his decease, to another, such ulterior limitation was void, and the whole property vested in the person to whom the term was limited for life. (i) The reasons against the devising of a term over, after an estate for life created out of it, were very artificial: one was, the exility or small consideration of a term; an estate for life being, in the eye of the law, of greater estimation than the longest term: and the other, that the possibility of the term continuing longer than the life of the first taker, was not such an interest as by the rules of law could be limited over. And a case was adjudged in conformity with these principles, so late as the reign of Edward 6.

Relaxation of this rule, under cover of a dis-

In the progress of time, however, when long and beneficial terms came more frequently in use, and the con-

(i) Dyer, 74 b, pl. 18. 1 Roll. 476. 2 Harg. Jurid. Arg. 41. 2 Abr. 610, pl. 4. Bro. Abr. 235, pl. 13. F. C. R. 401. 6 Cru. Dig. 793. 1 Jarm. Wills. 393.

venience of families required that they should be allowed to be settled in the same manner as freehold estates, the judges began to relax this strictness, as to the bequest of a term by way of remainder. In the reign of Elizabeth, under a nice distinction between bequeathing the term itself, and bequeathing only *the use of it*, they allowed the bequest-over of a term, as appears by several cases in *Dyer* and *Plowden*. (*k*) But further than this, the judges would not go; for they still held, that if the *term itself* were bequeathed to a person for life, with a limitation-over after his decease, the whole vested in the first taker, and the ulterior limitation was void.

inction
between the
bequest of the
term itself, and
of the use only,
for life.

In the reign of James 1, however, the Courts, yielding to the general convenience, no longer resorted to the fine-spun distinction between the bequest of the term itself, and the bequest of the use of it only, for life, but established the limitation of a term after a previous grant of it for life, as an Executory devise, or, more correctly, as an Executory bequest. (*l*) In *Manning's* case, (*m*) which occurred in 7 James 1, a testator bequeathed the lease of a farm to M. M., after the death of his wife; and, in the meantime, his will and meaning was, that she should have the use of the farm during her natural life. It was contended, that

Ultimate
establishment
of the validity
of limitations
of terms after
prior bequests
for life, under
the name of
Executory
bequests.

(*k*) 10 Eliz. Dy. 277, b. *Wolsten v. Elkington*, 19 Eliz. Dy. 358 b. Plow. 619. *Paramour v. Yardley*, Plow. 539. Cro. Car. 346. *Hammington v. Rudyard*, 10 Rep. 52.

(*l*) "Our law never allowed of limitations of personal estate by way of remainder, in the proper sense of that word. It is observable that while the civil law in respect to heirship and alienation, and other general rights of property, makes little perceptible distinction between real and personal estate, except in the term of prescription, the nature of them in English law is wholly dissimilar, and scarcely

any rule of law which applies to the one, is applicable to the other. This is owing to the universality which prevails in England of the law of tenure, in which personal estate is of no account. Hence, possibly, it proceeded that till a late period of our law, personal property was not considered to be susceptible of modification. When at length it attracted the attention of our Courts, it was held that it could only be settled by way of Executory bequest or Executory trust." Butler, note to F. C. R. 567.

(*m*) 8 Rep. 94 b.

the devise to M. M. after the death of the testator's wife, was void, "for the wife having the same devised to her during her life, she had the whole term, and the devisor cannot devise the possibility over, no more than a man can do by grant in his life." But four judges out of five held that M. M. took the term, not by way of remainder, but by way of an executory devise. Lord *Coke* states the resolution of the judges to be, that, when the wife died, it should vest in M. M., as by an executory devise, as if the testator had devised that, after his son had paid such a sum to his executors, he should have his term; or that after the death of A., B. should have the term; or that after his son should have returned from beyond the seas, or that A. should die, that he should have it; in all these cases, and other like; upon the condition or contingent, the form of the devise was good, and in the meantime, the testator might dispose of it, and therefore in judgment of law, *ut res magis valeat*, the executory devise should precede, and the disposition of the lease till the contingent happened, should be subsequent, as in the case at bar. For when the testator made the executory devise, he might afterwards well devise the lease till the contingency happened; as if the testator had devised, that if his wife died within the term, that then M. M. should have the residue of the term, and further devised the same to his wife for her life. And, further, that there was no difference when one devised his *term* for life, remainder over, and when a man devised the land, or his lease or farm, or the *use* or *occupation* or *profits* of his lands; and that where a man devised his lease to one for life, it was as much as to say he should have so many years as he should live, and that if he died within the term, another should have it, for the residue of the years; and although at the beginning it could not be said how many years he should live, yet when he should die, it would be certain how many years he had lived and how many years the other should have, and so by subsequent act, all would be made certain.

The decision in *Manning's case*, we observe, proceeds upon the principle of transposing the limitations; that is, of considering the limitation-over, as a bequest on the contingency of the devisee for life dying during the term, and the life-estate, as an intermediate disposition, till the contingency happens, and so, constructively, changing the order of the limitations, by reading the ulterior limitation as if it actually preceded the intermediate bequest. In the case in question, indeed, the devise itself accorded with this mode of construing it, for the limitation to M. M. was antecedent to the intermediate disposition of the life-estate to the wife. But it is quite clear that the rule of construction adopted in *Manning's case* is applicable to all cases of a limitation of a term of years to one for life, and afterwards to another. (n)

Principle of construction on which the doctrine of Executory bequest rests.

Thus, in *Lampett's case*, (o) 10 James 1, a term of 500 years was devised to the testator's father for his life, and after his decease, the remainder over to another: upon the question, whether the ulterior limitation was good when the *term itself* (and not the use or occupation of it only) was devised for life, and afterwards to others; it was held, that the limitation-over was good by way of Executory devise; thus completely negating the former distinction between the devise of the term for life, and the devise of the use of it only, and admitting the rule of construction adopted in *Manning's case*, notwithstanding that, on the face of the will, the ulterior limitation was, in terms, *postponed* to the life-estate, and limited to take effect as a remainder after it.

These two cases are the pillars upon which rests the law of Executory bequests of chattels real. Their authority was, indeed, attempted to be impugned in two cases (p) which afterwards occurred; in one of which, a decision seemingly adverse was pronounced; but it is distinguishable from the cases of which we are speaking, and so far as it may be

(n) F. C. R. 403.

(o) 10 Rep. 46.

(p) *Child v. Baily*, Cro. Jac. 459.
Duke of Norfolk's case, 3 Cha. Ca. 1.

deemed as an opposing authority, it has been since overruled. And it has ever since remained settled, that chattels real may be limited by will in strict settlement, so as to answer all the purposes of an entail. (q)

Doctrine of
Executory be-
quests proceeds
on assumption
that a term is
incapable of
division into
particular-
estate and
remainder.

It will be observed, that the whole doctrine of Executory bequests of terms for years is grounded on the assumption, that there cannot possibly be a division of the term into particular-estate and remainder. And such division is impossible, not only because it would be inconsistent with the notion that an estate for life is of greater magnitude than any term of years, but, also, because of the native indivisibility of a term, except where a certain stated number of years is subtracted from the whole period, or it is otherwise definitely apportioned. For, if an estate for years be assigned or bequeathed to a person for life *immediately*, (that is, not through the medium of trustees) with a limitation-over after his death, it is certain, that during the life of the first taker, the whole term is in him; for as it is impossible to say, what portion of the term will expire during his life, and what portion will remain to the person entitled under the limitation-over, it is not partible between the two; and, not being partible, the whole must vest in the person for the time being in possession. (r) It is a rule in relation to remainders, at Common law, that the remainders must pass out of the grantor at the same time with the particular-estate; but, in the case of a term, there is no estate to constitute a remainder as distinct from the particular-estate, nor (if there were such an estate,) can it be predicated what the remainder will consist of. Having once ascertained that there is no remainder, in fact, nor any possibility of such a remainder, in the nature of the case, the question arises, what is the character of a limitation of a term, to take effect

(q) *Cotton v. Heath*, Roll. Abr. 612. *Doswell v. Earle*, 12 Ves. 478. *Theobalds v. Duffoy*, 9 Mod. 101. *Mallett v. Sackford*, 8 Vin. Abr. 89,

pl. 5. And see *Roe d. Bendall v. Sommersett*, 5 Burr. 2608.

(r) *Prest. Abst.* 4, 144. 3 ib. 152. *Butl. note to F. C. R.* 401.

after the decease of a person to whom a life interest in it has been previously allotted? And to this question it is manifest that the only answer is, that if the ulterior limitation is to take effect at all, it must do so in a manner, and upon principles, analogous to those which obtain in the case of an Executory devise of inheritance, to take effect after or in defeasance of a fee previously limited. There, the whole interest is disposed of, and to give effect to the ulterior limitation, resort must be had to the doctrine of Executory devises: in the case of a term limited for life, with remainder over, the whole interest becoming vested in the first taker, by necessary construction of law, the subsequent limitation cannot otherwise take effect than as an Executory bequest.

Here it must be noted, that as the learning of Executory bequests of estates for years is, by its very terms, confined to *testamentary* limitations, and, as there is no species of limitation in deeds applicable to such interests, analogous to Springing and Shifting Uses of inheritance, the proper way of creating future interests by deed in estates for years, or, in other words, making an *inter vivos* settlement of them, is, by vesting the whole term in trustees, and declaring trusts in favor of the several persons to whom interests are intended to be given. (s) These may be called *Future trusts*; and as the different modifications of interest in the settled term, effected through the medium of them, possess, in equity, all the attributes belonging to legal estates at law, and are alienable, when similar interests at law could be transferred, they effectually answer all the purposes of family settlements, or, at least, all such purposes as can be effected in wills through the medium of Executory bequests. (t) The difference between these Executory bequests and similar trusts in deeds being, chiefly, this; that whereas the former transfer the legal interest in the term to every person suc-

No mode of disposition of terms by deed, similar to Executory bequest.

(s) 2 Prest. Abst. 5.

(t) 1 Vernon, 235, 236. 6 Cru. Dig. 478.

cessively becoming entitled under the limitations, the latter in no way affect the legal interest; which remains vested in the trustees, from whom an assignment of it may be obtained, by any person acquiring an absolute interest in the trust of the term, under any of the limitations expressed in the deed.

Mode of limiting legal remainders in terms suggested, and observed upon.

There is, nevertheless, one mode in which (it would seem) (u) a legal remainder can be limited of a term of years; and that is, by a definite and specific apportionment of the term between the persons to whom interests in it are successively intended to be given. Thus, suppose A., being possessed of a term of 500 years, is desirous of settling it upon his wife B., for life, and after her decease, upon C. and D., his sons, and to be also desirous, in making such settlement, of limiting legal interests to the parties intended to be benefited.

This object may (it is conceived) be effected, by assigning the property to B. for 100 years, (or any other specific portion) of the term, if she shall so long live, and after the determination of the 100 years, then the property to remain to C. and D., for the residue of the 500 years' term. In such a case, B.'s interest in some degree resembles an underlease; during B.'s life, C. and D. have a vested legal remainder or reversion, (it may be doubted, which,) and when B. dies, the sub-term, limited to her, ceases, and the ulterior limitation thereupon vests in possession, for the whole residue of the term. And this mode of limiting successive legal interests in terms might (it should seem) be extended to a series of limitations in strict settlement. As, however, this method of limiting future interests in terms for years has never been sanctioned by the practice of the profession, or received judicial approval, it is impossible to say that it can be recommended as a mode of settlement of estates for years, preferable to that effected by means of

(u) 3 Prest. Abet. 153.

Future trusts. It is easy to foresee (*v*) that many questions, by no means easy of solution, might be raised upon the validity and effect of limitations made in the manner suggested, were the practice carried out to the full extent; and the possibility of such difficulties arising is a sufficient argument against resort to this untried expedient.

With respect to the different kinds of Executory bequests of terms for years, it can scarcely be said to be necessary to classify them, (*w*) inasmuch as, in every instance of such limitations, the whole term vests in the first taker, without regard to the extent of his beneficial interest. In the case of Executory *devises*, as we have seen, there are various modifications of interest to which the first taker may be confined; he may have a fee-simple, a fee-tail, a freehold, or a term for years only: and such varieties of interest give rise to, and necessitate the distinctions between the various modes of Executory devise. But in every case of Executory *bequest*, there is one common feature; viz., its operating to defeat or divest the whole interest in the term, which is previously vested in another person.

All kinds of Executory bequests have one common feature.

It may be well, however, to point to the distinctions which exist in Executory bequests of terms of years, in regard to the different ramifications of the beneficial interest.

Classes of Executory bequests.

The first sort of Executory bequest, viz., where a term for years is bequeathed to one for life, and, after his decease, to another, has already been illustrated and observed upon.

1. Limitation after a prior gift for life.

Another (*x*) kind is, where there is a complete disposition, both legal and beneficial, of the term, and there is a substitution of another gift, to take effect in some event which

2. Limitation after a prior complete legal and beneficial disposition.

(*v*) 3 Prest. Abst. 154. And see argument of Mr. Preston, in *Bengough v. Edridge*, 1 Sim. 248.

(*w*) Mr. Fearn treats all Executory bequests as constituting but one class, and takes no distinction between them, on account of difference in the nature and extent of the interest li-

mitted to the first taker. *Vide* F. C. R. 401, *et seq.* Mr. Preston, on the contrary, considers there is as much diversity in Executory bequests of terms, as in Executory devises of inheritance. See 2 Essay on Abst. 143.

(*x*) 2 Prest. Abst. 142.

is to defeat or abridge the former bequest. Thus, if A. bequeath a term of five-hundred years absolutely to B., provided that if he dies under twenty-one years of age, then C. shall have it. Here, not only the whole legal estate in the term is vested in B. under the bequest, but also the entire beneficial interest, subject, as to both, to an Executory bequest in favour of C., in the specified event.

3. Limitation
in futuro.

A third species of limitations of terms in wills, which, it has been said, (y) takes effect under the doctrine of Executory bequests, is, where a substantive and independent bequest of a term is made to wait for effect until a certain period, or the happening of a specified event; as, if a term be bequeathed to A., at the expiration of seven years from the testator's death, or upon the death of B. But it is very doubtful whether such a limitation of a term *does* come fully within the definition of an Executory bequest. This depends upon the question, whether the limitation of an existing term, to take effect *in futuro*, unpreceded by a gift to any other person, was good at the Common law. If so, then the limitation under consideration is not, strictly speaking, an Executory bequest; but if such a limitation was contrary to the rules of the Common law, then, only under the doctrine of Executory bequests, can it be now admissible.

But questionable whether this be an instance of Executory bequest.

Examination
of this point.

In the first place, it is quite clear that a term of years may be *created* to commence at a future period, either by deed or will. (z) But an assignment of a term by *deed* is, it seems, void, unless it create an immediate tenancy. (a) There are, however, no satisfactory authorities for this position; and cases are to be found, which support a contrary doctrine. (b) It may, nevertheless, perhaps, be safely averred, that the assignment of a term to take effect upon

(y) 2 Prest. Abst. 43.

Jermyn v. Orchard, Show. Parl. Ca. 199, as warranting the inference.

(z) Com. Dig. tit. "Estates," G.

9. 2 Prest. Abst. 7.

(b) Plow. Com. 524.

(a) 2 Prest. Abst. 6, 144, citing

the death of a person (as if the lessee grant his term after his death,) is void, on the technical ground, that the life is to be presumed of longer continuance than the term; which is still of force in regard to limitations in deeds.

With respect to limitations of terms in *wills*, to commence *in futuro*, we are to observe, that the testamentary power was exercised over terms for years, and other chattel interests in land, prior to the Statutes of Wills, on account of the original imbecility and insignificance of such interests. (c) The *presumption*, therefore, is in favour of the hypothesis, that bequests of terms of years to commence *in futuro* were, or would have been, allowed at Common law; since it is highly reasonable to suppose that the plans and exigencies of testators would lead to such dispositions being sometimes attempted; although it must be admitted, no authorities can be adduced to warrant such a supposition. At all events, it may, perhaps, with tolerable certainty, be asserted, that a bequest of a term after the death of a person, whether preceded or not by the limitation of a prior interest to such person, would have been invalid at the Common law, because of the old legal notion that an estate for life was a greater interest than the longest term.

But, whether a limitation of a term *in futuro* be an example of Executory bequest, or whether it be a species of testamentary disposition which was allowed at the Common law, it is, certainly, a mode of bequest, intimately connected with the doctrine of Executory bequests, and involving much of the learning on the creation and qualification of such interests. (d)

Conclusion—
that limitations
of terms *in
futuro*, if not
actually Exec-
utory be-
quests, involve
the learning
applicable to
such interests.

(c) Harg. notes to Co. Litt. 111 b, note 1. *Vide supra*, p. 15.

(d) It may here be proper to state, that the opinions of three eminent writers on the law of real property, Mr. Butler, Mr. Preston, and Mr. Jarman, are all favourable to the affirmative view of the question noticed

in the text. Mr. Butler (note to F. C. R. 401), after stating that there cannot, strictly speaking, be a remainder in chattels real and personal, says, "and, therefore, every future bequest of personal property, whether it be preceded or not preceded by a prior bequest, or limited on a certain or un-

The examples, above given, (whether two or three) of Executory bequests of terms of years, will be found to comprise every testamentary limitation taking effect in that character; and the wills of most testators possessed of leasehold property supply instances of such limitations, except when the terms are vested in trustees, and the interests of the persons intended to take beneficially, are limited through the medium of *trusts*.

Of Executory bequests of chattels personal.

Ancient reasons against gifts of such property after a prior limitation for life.

The validity of Executory gifts of *chattels personal* was not established so early, as was that of Executory bequests of terms of years. (*e*)

The objection taken to their being made the subject of such modifications of ownership, was almost one with the reason urged against limitations of a term of years after a previous disposition of it for life:—the latter being, as before observed, the exility or small consideration of a term as compared with a life-estate, and the unpresumable continuance of a term beyond the period of a life; and the former, the perishableness of the subject-matter of the gift, which, it was said, could not be supposed capable of endurance or preservation beyond the period of a life. Accordingly, we find it expressly laid down (*f*) as a clear rule of law, that the disposition of a personal chattel, even though only for an hour, operated to vest the absolute interest in the person to whom it was limited, so that he

certain event, is an Executory bequest, and falls under the rules, by which that mode of limitation is regulated." Mr. *Preston* (2 *Essay on Abst.* 144,) considers, that as an assignment of a term by deed, to commence *in futuro*, is, upon principle, and (he thinks) authority, invalid, so also would a correspondent *bequest* of a term be, at Common law. Mr. *Jarman* (1 *Treat. on Wills*, 793,) says, "no remainders can be limited in real and personal chattels; every *future bequest* of which, *therefore*, whether preceded by

a partial gift or not, is in its nature executory." What connexion there is between the premiss, that no remainder can be limited in chattels, and the conclusion, that "therefore" a future gift unpreceded by a prior limitation is an Executory bequest, the writer is unable to discover; although, doubtless, the learned reader's penetration will supply the hidden link in the chain of reasoning.

(*e*) 2 *Harg. Jurid. Arg.* 51.

(*f*) 8 *Rep.* 95. And see 2 *Harg. Jurid. Arg.* 51.

might sell or dispose of it; and every limitation over was void.

In the course of time, the same distinction was admitted in bequests of chattels personal, as the judges (in the wise relaxation of a rigorous rule, and in conformity with the superior respect paid to testamentary dispositions, although contravening the ancient rules of law,) allowed in limitations of terms of years: they sanctioned the bequest of *the use* of a personal thing, for life, with an ulterior limitation-over of the chattel, to take effect on the first legatee's death; but still held, that the bequest of the *chattel itself* for life, invalidated any further limitation of it, and operated to vest the whole of it in the first taker. (g) This distinction was manifestly adopted, out of a desire to yield to the general convenience, which required that chattels personal should be allowed to be made the subject of settlement, in the same manner as real estate, and, at the same time, an unwillingness to give up the restrictions of the ancient Common law, for which the judges, in the times of which we are now speaking, always evinced great partiality.

Distinction taken between a gift of the chattel, and of the use only, for life.

This subtle distinction was longer and more tenaciously adhered to, in regard to Executory bequests of personal chattels, than to similar limitations of terms for years. (h) Especial regard appears to have been had to the imbecility and insignificance of personalty, in the eye of the law; and it was argued, that though terms of years and other chattel interests in land, were but of comparatively small consideration, yet, as the subject-matter of those interests was permanent and substantial, there was greater reason for allowing Executory bequests of them, than could be urged for the extension of a similar privilege to the meanest property of which the law was cognizant.

This distinction long adhered to.

As, however, personalty increased in consideration and But ultimately

(g) Bro. Ab. tit. Devise, Cro. Car. of Sir W. Grant in *Randell v. Russell*,
346. *Fachel v. Fachel*, 1 Cha. Ca. 3 Mer. 195.
129. F. C. R. 401. Observations (h) 2 Harg. Jurid. Arg. 52.

gave way to general convenience.

And therefore gifts of chattels, after a prior limitation for life, are good.

The means adopted for preserving chattels personal for the ulterior legatee.

importance, this artificial distinction between the bequest of *the use* of a personal chattel, and of the thing itself, was gradually abandoned. (i) The final struggle made in its behalf, was in the year 1695, in the case of *Hyde v. Parratt*, (k) where, after argument and consideration, Lord Keeper *Somers* adjudged a bequest-over of household goods, &c., to H., after the death of the testator's wife, (to whom a life-interest had been previously given) to be good. The ground of the decision was, that such a limited gift entitled the restricted legatee, only to the *use* of the thing bequeathed, for the period expressed, and did not vest the entire beneficial and legal interest in him. (l) Since this adjudication, it has always been considered perfectly settled, that an Executory gift of chattels personal, after a prior limitation for life, is equally valid with a similar bequest of a term of years. (m) And this, too, upon the same ground as that assigned in *Hyde v. Parratt*; viz., that a gift for life of a chattel is to be construed as a gift of the *usufruct* only.

In the case of a gift of goods, &c., to a person for life, with an Executory bequest-over, the Courts of equity have always, during the continuance of the prior interest, adopted means to protect the rights of the ulterior legatee. Formerly, the legatee for life was compellable to give security for the chattels being forthcoming at his decease. (n) But

(i) *Catchmay v. Nichols*, 1 P. Wms. 6, note; *Shirley v. Ferrers*, *ibid.*; in both which cases, the first legatee was also executor, and, therefore, as Mr. *Fearne* says, the old distinction between the *use* of a thing and the thing itself, might not be considered as completely abandoned, on account of the legatee taking the thing itself as executor, and the use only, constructively, as legatee for life. See F. C. R. 405.

(k) 1 P. Wms. 1. 2 Vern. 331. And see 2 Freeman, 206; and *Clarges v. Albemarle*, 2 Vern. 245.

(l) The establishment of the validity

of Executory bequests of terms for years occurred upwards of eighty years earlier than the settlement of the same doctrine in regard to chattels personal; *Lampett's case*, 10 Rep. 46, having been decided in the year 1613, and *Hyde v. Parratt*, (as stated in the text) in the year 1695.

(m) See *Tiffin v. Tiffin*, 1 Vern. 2. *Martin v. Long*, 2 Vern. 156. *Johnson v. Castle*, 8 Vin. Ab. 104, pl. 12. *Upwell v. Halsey*, 1 P. Wms. 651. *Pleydell v. Pleydell*, *ib.* 748.

(n) 2 Freeman. 206. *Hyde v. Parratt*, *ubi supra*. F. C. R. 406.

the modern practice is for the legatee for life to sign an inventory; (o) which, as it has been said, is more equal justice, as there ought to be danger, in order to require security. (p)

As in the case of terms for years, so of personal chattels, the whole *legal* interest vests in the legatee for life, and, on his decease, passes, under the Executory bequest, to the ulterior legatee. (q) During the life, therefore, of the first taker, the Executory legatee has no interest of which the law can take cognizance, and has no remedy at law, by trover, or otherwise, for the recovery or restoration of the chattels, in case of spoliation, transfer, or other act of the legatee for life, likely to produce a consequent deterioration or destruction of the subject-matter of the gift.

The liability of the chattels to the acts and engagements of the legatee for life, and the remedies of the executory legatee.

Nor is it clear, where the party beneficially interested for life is also clothed with the *legal* title, that even a Court of equity would interfere, during his life, on behalf of the ulterior legatee, to preserve the goods, &c., from the legal consequences attaching to the possession of personal chattels; *ex gr.* their liability to be taken in execution by the creditors of the first taker. (r) That there is a strong principle of justice for preserving personal chattels for the benefit of the executory legatee, was admitted by Lord *Thurlow*; (s) nor would it seem, when the *subject* of the gift is itself at stake, that the circumstance of the interest of the first taker being clothed with the legal estate is of sufficient weight to preclude the interposition of a Court of equity. (t)

If, however, the chattels are vested in *trustees*, and the beneficial interests limited by way of trust, then, as the legal interest in them resides in the trustees, they are in a position which will enable them, in a Court of law, to recover

(o) *Bill v. Kinston*, 2 Atk. 89. 144.
And see 3 P. Wms. 336; 2 Atk. 321.

(p) Per Lord *Thurlow*, 1 Bro. C. C. 279.

(q) F. C. R. 402. 2 Prest. Abst.

(r) *Foley v. Burnell*, 1 Bro. C. C. 274.

(s) *Ibid.*

(t) F. C. R. 412.

the goods, &c., even during the life of the first taker, in case of any act by him detrimental to the interests of the executory legatee. (u)

But whatever be the liability of chattels personal, during the existence of the antecedent interest, in respect of the acts and engagements of the first taker, it is clear, that he cannot subject them to the demands of his creditors, or otherwise dispose of them, beyond his own life-interest therein. It is also certain, that the ulterior legatee, or the trustees, if the limitations are equitable, may, upon the determination of the prior interest, maintain an action of trover, at law, for damages, or institute a suit, in equity, for execution of the ulterior gift *in specie*, by actual delivery of the specific chattels. (v) Nor are the rights of the parties entitled to the ulterior executory interests, affected in a greater degree by a disposition (whether by way of sale or security) of the goods, &c., by the legatee for life, for valuable consideration without notice, possession of chattels not being absolute proof, though affording a *prima facie* presumption, (w) of ownership. (x)

The same
Executory
gifts may be
made of chat-
tels personal as
of terms of
years.

Executory bequests of chattels personal have hitherto been considered in reference only to the ordinary case of a bequest of personalty to a person for life, with a limitation over to another on the first legatee's death. But it need hardly be observed that this is not the only mode in which the doctrine of Executory bequests of such interests is admissible; for all such limitations as are good in respect of terms of years, are also valid as regards chattels personal, *et à converso*. And, therefore, personalty may be bequeathed to one absolutely, and in the event of his dying under a certain age, then over. (y) So, also, a bequest of personal

(u) *Cadogan v. Kennett*, Cowp. 432. 1 Jarm. Wills. 794.

(v) *Hoare v. Parker*, 2 T. R. 370. And as to suits in equity for the delivery of specific chattels, see *Duke of Somerset v. Cookson*, 3 P. Wms. 390.

Fellis v. Read, 3 Ves. 70. *Lowther v. Lowther*, 13 Ves. 95.

(w) 2 Stark. Evid. 833.

(x) *Hodde v. Parker*, *ubi supra*.

(y) 2 Freem. 137. And see *Madoc v. Staines*, 2 P. Wms. 421.

chattels may be made to commence *in futuro*, unpreceded by any disposition thereof for life, or other period. The same question may exist, indeed, whether such a limitation be, in the strict sense of the term, an Executory bequest, as we have noticed in regard to similar limitations of terms for years. But in reference to both, it is to be observed, that for the purposes of this Treatise, they may properly be considered as taking effect under the doctrine of Executory bequests; the rules of law in regard to the latter being generally applicable to the limitations in question.

Chattels personal, like terms of years, not being susceptible of division into particular-estate and remainder, and there not being any mode of limiting future interests in them, in deeds, analogous to Executory bequests, the only mode of settlement by deed, of which personalty is capable, is, through the medium of *trusts*; and, as was observed of terms of years, all such limitations of the beneficial interest in personal chattels are allowable by means of trusts, as are valid in wills, under the doctrine of Executory bequests.

The only mode of settlement of chattels personal by deed, is through the medium of trusts.

Before quitting the subject of Executory bequests of personal chattels, a distinction must be noticed in regard to a class of such chattels, to which the doctrine under consideration is not applicable. The class, referred to, consists of those articles, (such as, corn, and hay, and the like,) the use of which consists in the consumption, or, as it is expressed, *quæ ipso usu consumuntur*. To such things, the notion of a division or succession of interests, is entirely inapplicable.

Of chattels personal *quæ ipso usu consumuntur*.

Doubt appears formerly to have existed, when the articles in question have been bequeathed to a person for a limited period, with a gift-over, what was to be done with respect to them; and the opinion seems to have been entertained by some judges, that they should be sold, and that a person entitled only to a limited use of the chattels, should have

Formerly ruled, that when such chattels were given for life with an ulterior limitation, they should be sold, and interest of

produce paid to legatee for life.

Now settled, that when specifically given, the whole property vests in the first taker, but if included in a residuary gift, the chattels to be sold, and interest of produce paid to legatee for life.

the interest of the money realized by the sale. (s) But this notion has been since partially exploded.

The rule appears now to be, that a *specific* bequest for life, of things *quæ ipso usu consumuntur*, is a gift of the property, and that there can be no limitation-over after a life interest in such articles; but that if they are included in a *residuary* bequest for life, then they must be sold, and the interest of the produce enjoyed by the tenant for life. (a) The following observations of Sir Wm. Grant, to whom we are indebted for this reasonable rule, are as pertinent to the general subject of Executory bequests of chattels, as to that particular branch of it now under notice.

“Originally we know that by our law there could be no limitation-over of a chattel, but that a gift for life carried the absolute interest. Then, a distinction was taken between the use and the property. The use might be given to one for life, and the property afterwards to another. A gift for life of a chattel is now construed to be a gift of the usufruct only, but when the use and the property can have no separate existence, it should seem, that the old rule must still prevail, and that a limitation-over after a life-interest must be held to be ineffectual.”

How far this rule would apply to the case of an *absolute* gift of such chattels, subject to a limitation-over.

It is conceived, that the like rule would hold in regard to a bequest of this class of chattels to a person *absolutely*, subject to an executory gift in favor of another, on a specified event; although it should seem, that the argument against the validity of the ulterior gift, derived from the circumstance of the use and the property of the chattels not being susceptible of separate existence, is scarcely applicable to such case. The first gift, in the supposed case, is of the whole chattel, if of anything; and so also is the posterior one. And it may, perhaps, therefore, be

(s) *Porter v. Tournay*, 3 Ves. 311.

(a) *Randell v. Russell*, 3 Mer. 194.

And see *Hardman v. Johnson*, ib. 347.

argued, that as the ulterior limitation is not postponed to a gift incompatible with the ephemeral character of the subject-matter, (which a life-interest is,) but is made in *lieu* of a prior limitation carrying the whole interest, the chattels should be converted into a species of property, which may abide the issue of events. Certainly, such must be the conclusion, when the operation of the preceding gift itself depends on a future contingent event, which may not happen until after the destruction of the subject-matter by use, and the happening or non-happening whereof, is to decide which of the two gifts takes effect, and which, fails.

We cannot, perhaps, find a better conclusion for this chapter, than the following words of Mr. *Hargrave*, (b) with which he sums up an inquiry into the history and progress of Executory devises and Executory bequests, similar to that in which we have been engaged:—"At length, a great, though partial, victory, appears to have been gained for Executory devises, and for limitations and trusts of the same nature, over every species of property in England, that is, over freehold and inheritance, over real chattels, and over chattels personal. Thus, neither the feudal strictness of conveyance, in the first of those three kinds of estates, especially against creating a freehold *in futuro*; nor the exility or meanness of interest, in the second; nor the moveableness, casualness, and perishableness of quality, in the third; nor the doctrine against possibility on a possibility, with the danger of perpetuity, and of abuse in other respects as to all three; finally availed to accomplish the absolute exclusion of Executory devise; all those objections being so successively encountered, and so successively subdued, that, at the utmost, they have only contributed to reduce Executory devise within regulation and circumscription."

General observations as to the limitations treated of in this chapter.

(b) 2 Jurid. Arg. 53.

CHAPTER VIII.

OF TRUSTS ANALOGOUS TO SPRINGING, SHIFTING, AND FUTURE
USES, AND EXECUTORY DEVISES AND BEQUESTS.

It will be proper to give a short account of limitations of the trust or equitable interest of property, corresponding to Executory devises and bequests, and Springing and Shifting Uses, in regard to the different estates and interests affected by those limitations, respectively. These limitations of the trust also resemble legal Executory limitations, in respect to the various kinds of settlement which may be effected by them, although differing in the mode of their creation, and in the nature of the estates and interests which may be raised by means of them. As this description shews, the limitations, alluded to, have to do only with the *trust* or *equitable interest* of property, and not with the legal seisin or ownership, which is supposed to be either already vested in some person, other than the settlor or testator, or is by him actually transferred to such person, at the time of the creation of the Future trusts, for the purpose of feeding them, or, in other words, forming the basis of the contemplated settlement.

All limitations allowable as Springing or Shifting Uses or Executory devises or bequests, may be created out of the trust or equitable interest.

We have seen, that Executory devises and bequests are species of testamentary dispositions allowed by the Courts of law, and, when properly exercised, effectually passing the legal estate or interest to all persons in favor of whom dispositions are made. It has also been seen, that limitations by way of Springing and Shifting Use, are modes of settlement, by instruments *inter vivos*, based upon the Statute of Uses, and, like all other limitations of Uses

operated upon by that Statute, effectually transferring a Common law seisin or ownership to all persons entitled to interests by virtue of them. The estates and interests which, by means of these several classes of limitations, may be created at law, and of which the law will take cognizance, are, in the same manner and to the same extent, allowable in *equity*, under a disposition of the *trust* of property, and will receive all the protection and favor which that branch of our jurisprudential system is accustomed to extend to other kinds of trusts, as the peculiar offspring of its polity. If, for example, a testator devise land to A. in fee, in trust for B. in fee, and in the event of B.'s decease under the age of twenty-one years, in trust for C. in fee, the limitation in favor of C. is not, in strictness, an Executory devise, because the legal estate being vested in A., a Court of Common law cannot regard any limitation of the beneficial interest as separate from and unconnected with that; which the disposition in favor of B. is; and such being the case with respect to that limitation, the like holds in regard to the Executory limitation to C. So, also, if, by deed, land be conveyed to A. in fee, in trust for B. in fee, until his marriage, and after his marriage, in trust for C., the limitation in favor of C. is, simply, a Future trust, although, had no legal fee been previously vested in A., that limitation would take effect as a good Shifting Use, by means of which the Common law seisin would pass to C., on the happening of the specified event. And so, again, if a term be bequeathed or assigned by deed to A., in trust for B. for life, and after his decease, in trust for C.; or in trust for B. absolutely, and in the event of his death under twenty-one, then in trust for C.; the ultimate limitation, in both cases, takes effect as a Future trust. In the case of the bequest, this construction holds, because the legal interest in the term being previously vested in A., the limitations in favour of B. and C. are necessarily equitable only, and do not admit,

therefore, of the application of the doctrine of Executory bequests: in the case of such a settlement by deed, however, the limitation by way of trust is resorted to, from imperative necessity; there being no mode known to the Common law, by which future and executory interests in chattels may be created by instruments *inter vivos*. It will be observed, that Executory devises and bequests and Springing and Shifting Uses differ only from the analogous trust, in the *quality* of the estate or interest capable of being created by them, respectively: it follows, therefore, that whatever modification of right in property may be made the subject of the former class of limitations, is equally susceptible of transfer and settlement through the medium of trusts; and that, in regard both to the nature and extent of the limitations which may be created by each, the limits imposed by law are correlative and coextensive.

The limitations, of which mention has here been made, are frequently termed *Executory trusts*; and not improperly, as their operation is to create future equitable interests in property, resembling Springing and Shifting Uses, and Executory devises and bequests; whose generic description is, *Executory limitation*; as contra-distinguished from gifts taking effect by way of remainder. But the use of the term, Executory trust, has been avoided, because occasion will hereafter arise for reference to a particular class of trusts, known as *trusts executory*, of a character entirely different from those we have been considering, and in reference to which, therefore, a confusion of terms is undesirable.

CHAPTER IX.

COMPARATIVE VIEW OF SPRINGING, SHIFTING, AND FUTURE
USES, AND EXECUTORY DEVISES.

THERE is a very extensive analogy, in point of principle, between Springing and Shifting Uses and Executory devises. Executory bequests are not here mentioned, because as they affect only personal property, and Uses relate only to real estates, no analogy can exist between any form or modification of Uses and limitations by way of Executory bequest. Nor are Future trusts included in the subjects of this analogy, since there are limitations which cannot be substantiated as Springing and Shifting Uses, but which would be perfectly valid, if created by way of trust, or out of an equitable estate or interest.

Every kind of disposition which may be effected by way of *Use* in a *deed*, may be effected to an equal (and, as we shall presently see, even greater) extent, by a direct *devise* of the *land* itself. (c) Nor is the case varied, if the limitations in the *will* be through the medium of *Uses*, because, although it be doubtful whether those Uses can be said to be strictly executed by the statute 27 H. 8, the construction of the will is guided by the intention of the testator, and the mere interposition of a Use will make no difference. The distinction in name, therefore, between these limitations arises from two causes:—First, because the limitations in a will are not necessarily (nor even generally) created by

All limitations which may be created in deeds by way of Springing and Shifting Use, are equally allowable in wills, under the doctrine of Executory devise.

Reasons of the nominal difference between these limitations.

means of Uses, executed or unexecuted; and, secondly, because it is questionable, whether Uses limited in a will are within the operation of the Statute of Uses.

Their chief resemblance consists in an entire disregard of the strict rules of the Common law.

Springing and Shifting Uses and Executory devises resemble each other in nothing more, than in their mutual disregard of all the rules of the Common law regulating the limitation of estates. By way of Springing Use, we have seen, (d) a freehold *in futuro* may be created to arise, either at a fixed period, or on the happening of a specified contingency. This also may be effected in wills, through the medium of Executory devises. By way of Shifting Use, a previous fee-simple may be limited to determine, and another fee-simple substituted in its place, at any future period; and this is allowable, also, in Executory devise. By Shifting Use, likewise, an estate of freehold may be determined, and a future Use limited to take effect, on the happening of a specified event, before the regular and natural expiration of the first estate. This is a mode of limitation admitted, too, under the law of Executory devise.

A superior favor shewn to Executory devises.

But the Courts of Common law have evinced much greater favor towards Executory devises than Springing and Shifting Uses. Whether that partiality originated in the generous presumption, that a man's last will is made when he is *inops consilii*, and that, therefore, a more limited construction ought to be put upon his dispositions, we will not stop to inquire. Neither will it much profit us to examine, whether the greater rigor and strictness with which Springing and Shifting Uses are regarded, be caused by a secret repentance for deviation from the simplicity of the Common law, in the construction of instruments *inter vivos*; in regard to which, conformity to old rules and principles may be more reasonably required.

These observations premised, we will proceed to inquire, wherein the rules applicable to these various kinds of Executory limitations agree, and wherein they differ.

(d) *Vide supra*, p. 57, et seq.

1. In putting a construction upon a series of limitations by way of Use, as it has been well said, (e) the test to be applied, is conformity or non-conformity to the rules of the Common law, and the result of the application of that test varies according as the limitations are shaped as *remainders*, in which form they obey the rules of the Common law; or are shaped as *Executory uses*, in which form, their legal operation under the Statute of Uses, is measured by the equitable standard of Uses before the statute. Thus, as we have before seen, (f) all future Uses limited by way of remainder after an estate previously limited are subject to the rules of the Common law, and, therefore, liable to failure or destruction, if the previous estate be not sufficient to support them, or determine before they can take effect in possession. (g) This doctrine holds equally, although the consequence of not construing the future limitation as a Springing Use, be, that it is actually void in its creation, if not so considered. Hence, if land be conveyed to the use of A. for twenty years, remainder to the use of the heirs of J. S.; this contingent Use, being unsupported by an estate of freehold, is void in its very creation, under the well-known rule of the Common law, in regard to the estate necessary to support a contingent remainder, and will not be admitted as a Springing Use. (h) And, so, if realty were limited to the use of A. for life, and after his decease and one day, to B.; the future Use, not being capable of vesting in possession *eo instanti* of the determination of the prior estate, is void as a remainder, and at the same time not allowed as a Springing Use. (i) In each of these cases, if the ulterior limitation were not preceded by a prior estate, it would be good as a Springing Use to arise on the event specified;

1. Springing and Shifting Uses differ from Executory devices, in that contingent limitations either after particular-estates for years, or after the determination of a prior estate, and the lapse of a further period, are void as future Uses, but valid by devise.

(e) Hayes Conv. 105. And see Sugd. Gilb. Uses and Tr. 176, note. 1 Prest. Abst. 129.

(f) *Vide supra*, p. 56.

(g) *Carwardine v. Carwardine*, F. C. R. 388. Sugd. Gilb. Uses and

Tr. 165, note.

(h) *Adams v. Savage*, 2 Raym. 855. 2 Salk. 680. *Rawley v. Hol-land*, 22 Vin. Abr. 189, pl. 11.

(i) Sugd. Gilb. Uses and Tr. 167, note, and 176, note. F. C. R. 398.

but, being limited by way of remainder after a preceding estate, it is bound by the rules of Common law, which render it void *ab initio*. (k) Or if the future Use were limited in *defeasance* or *derogation* of the previous particular-estate, it would be a valid Shifting Use; but in each of the cases put, as it is to await the regular determination of the prior estate, and is intended to take effect as a remainder, it must stand or fall as a contingent Use in remainder, and, therefore, entirely fails.

Mr. *Sanders*, in his *Essay on Uses and Trusts*, (l) observes upon the cases of *Adams v. Savage*, and *Rawley v. Holland*, cited in the margin, (and which afford instances of the former of the two kinds of limitation now under consideration) that there does not appear to be any satisfactory reason, why the ulterior contingent limitation after the preceding term for years should not be supported as a Springing Use, and endeavours to explain away the decisions in those cases, by the suggestion, that at the time they were decided, the events on which the ulterior limitations were to arise, were too remote in point of perpetuity. Serjeant *Hill*, also, in a MS. note on *Adams v. Savage*, (m) makes a query to the like effect. This suggestion, however, is precluded by the fact, that the Use undisposed of, and which (if any) would result to the grantor, was no more than an estate of freehold, and, of course, in order to an ulterior limitation taking effect as a Springing Use, the Use which results must be a *fee*, and not an estate of *freehold* only, which would admit of and even necessitate the construction of the subsequent limitations operating as remainders. It is observable, also, that Mr. *Preston* (n) assumes it, as settled law, that as well in the case of a limitation for a term of years, with a future contingent Use by way of remainder, as in the case of a limitation for life, with a future Use after

(k) Sug. Pow. 29. F. C. R. 284.

(l) Vol. I, p. 142.

(m) Stated in 1 Sand. Uses, 143.

(n) 1 Essay on Abst. 114, 130, 131.

the determination of the life-estate, with a further intervening period of a day or the like, the ulterior limitations are valid as Springing Uses, because they cannot be good consistently with the law respecting remainders. In the former, we have seen that the learned writer is opposed by decided cases; in the latter, the rules generally laid down, the tendency of the Courts, and the observations of several ancient authors, equally point to a different doctrine. In both these cases, the Courts have denied to Springing Uses the favor which is extended to Executory devises: the ulterior limitation in both being clearly valid in a Will by way of Executory devise. (*o*) Thus, (*p*) where a testator seised in fee devised to trustees for 500 years, remainder to the first and other sons of B. in tail, (B. having no son at the time of the testator's death) remainder in fee, it was held, that the limitation to the first son of B. was a good Executory devise, and that the freehold descended to the heir at law until the birth of a son of B., or his death without such a son. And, so, (as to the second of the above supposed cases) there is no question that wherever the precedent estate is necessarily determinable before the taking effect of the ulterior limitation, the latter will be construed an Executory devise. (*q*) The will may give a preceding estate of freehold, capable, *in its own nature*, of supporting a contingent remainder; yet, if the ulterior limitation want that connection with it, necessary to constitute it a remainder, it can only be good as an Executory devise. (*r*)

Before dismissing this point, it may be proper to observe, that the rule, that contingent Uses by way of remainder must be governed by the rules of the Common law, is subject to one exception. It is, that, when a use is limited in contingency to several persons who do not all become

One exception to the rule, requiring contingent Uses by way of remainder to conform to the rules of the Common law.

(*o*) Sugd. Gilb. Uses and Tr. 168, 2157.
note. 1 Sand. Uses, 142.

(*p*) *Gore v. Gore*, 2 P. Wms. 28.
And see *Harris v. Barnes*, 4 Burr.

(*q*) 1 Jarm. Wills. 779, 780.
(*r*) F. C. R. 398.

capable of taking at the same time, they may succeed jointly, notwithstanding the different times of vesting; although, at the Common law, *unity of time* is essential to an estate by joint-tenancy. (*s*)

2. Springing and Shifting Uses must be raised out of a proper seisin, either created for the purpose or already existing; *secur.*, as to Executory devises.

2. The next point in which Springing and Shifting Uses differ from Executory devises, is almost implied in the very names of those limitations themselves. Whenever Uses are created by assurances operating by way of transmutation of possession, as a feoffment, or lease and release, two things are necessary, in order to those Uses being executed by the Statute of Uses; viz., first, a sufficient estate must be conveyed, according to the rules of the Common law, (*t*) to serve or answer the Uses to be limited; and, secondly, the Uses must be raised out of the seisin created by the conveyance. (*u*) Without compliance with these requisites, the limitations will either be altogether void, or raise mere trusts in equity. An Executory devise, as is manifest from what has been before said, escapes the observance of either of these formalities, nor is any other, necessary to the validity of an Executory devise, if the intention be manifest, and the will legally executed. As regards assurances not operating by transmutation of possession (covenant to stand seised, and bargain and sale,) the Uses are raised on the seisin of the covenantor or bargainor, and the assurance itself passes a Use, and, therefore, the two requisites mentioned are inapplicable, because the observance of them is necessarily implied in the nature of the assurance.

3. Further distinction, if doctrine of

3. A further distinction between Springing and Shifting Uses and Executory devises will be taken by those who

(*s*) F. C. R. 312, et seq. Burt. Elem. Comp. 285. *Vide infra*, p. 118.

(*t*) Therefore, a conveyance of the freehold commencing *in futuro*, on which the Uses are raised, is bad, and the Uses will fail. The seisin must be a *present* one: the Uses can be limited according to the intention.

See *Ros v. Trimmer*, 2 Wils. 75; *Edmonds v. Booth*, Yelv. 31; Sagd. Gilb. Uses and Tr. 163, note; 1 Sand. Uses. 137.

(*u*) *Vide supra*, p. 61. Sagd. Gilb. Uses and Tr. 163, note. 1 Sand. Uses, 137.

affirm the doctrine of *scintilla juris*, or the necessity of a possibility of seisin remaining in the feoffees or releasees to *scintilla juris* be true. Uses, to serve all future Uses, as they arise. The consequence of that doctrine is, that, if the possibility of entry or *scintilla juris* of the feoffees or releasees be destroyed or disturbed, as well as the other preceding estates, there being then no seisin to the contingent Use when the event happens on which it is limited, it can never arise, unless such possibility of entry be revested, by the actual entry of some of the persons entitled to the preceding particular-estates, or of the feoffees or releasees, or their heirs. The shallow reasoning on which this subtle doctrine is grounded, has induced most modern writers to deny its existence as a rule of law, altogether. An argument from analogy may be adduced. It is well established that a *right of entry* is sufficient to support a contingent remainder at Common law; (v) and why, therefore, if future or contingent Uses limited after preceding estates be suspended or divested, should there be any necessity for an actual entry, such as that before referred to, in order to revest either the *possibility* of seisin, or the *actual* seisin of the feoffees or releasees, and thereby to enable the statute to transfer the possession to the contingent Uses as they arise? (w) But a further important consequence ensues from this doctrine, in reference to the raising future Uses; viz., that if there be no right of entry left in any preceding vested estates (in which case the feoffees or releasees, it is said, must enter), or, there being such, the entry is not made; and the feoffees or releasees should bar their own right of entry upon such an occasion, by feoffment, release, or otherwise; the future Uses in such a case can never be executed, for want of a seisin in the feoffees or releasees out of which they may arise. (x) The practical disregard, however, of this and every other consequence of the doctrine in question, is its

But it is not ;
and why.

(v) *Archer's case*, 1 Rep. 67 a.
And see ib. 135 b; F. C. R. 286.

(w) F. C. R. 300, 301.
(x) Ibid. 295.

surest refutation, although the theoretically speculative have indulged in much argumentation on its merits. When once, therefore, it is ascertained, that a sufficient and valid seisin is created, out of which to raise the future Uses, all difference between Springing and Shifting Uses and Executory devises, ceases; and the Uses will take effect according to their original limitation, without regard to the acts of the owners of preceding estates, or of the feoffees or releasees, in the same manner as if the creation of any seisin at all were unnecessary. (y)

4. A limitation by deed originally made as a remainder must stand or fall as such; but a limitation by will intended as a remainder, may subsequently take effect as an Executory devise.

4. A fourth difference in favor of Executory devises, is, in the rule by which the nature and ultimate operation of a limitation (either by way of use or devise) is fixed. In the case of a *future use*, if its place in the series of limitations indicates, that its inceptive operation is that of a remainder, no subsequent alteration of circumstances will convert it into a Springing Use, or enable it to stand or fall otherwise than as a remainder. In the case of a limitation by *will*, originally, and on the face of it, in the nature of a remainder, such a change of circumstances in *the testator's lifetime* as would invalidate the limitation in question in the character of a remainder, will allow of its becoming an Executory devise, and taking effect or failing, accordingly. (x) Thus,

(y) The following argument, from probable consequences, has been urged in support of the *scintilla* doctrine:—
“If the judges had not admitted this doctrine, they must have allowed the seisin of the last *cestui que use* to have been sufficient to support a contingent Use, when it came in *esse*, which would be raising a use upon a use; or else they must have determined that the lands should remain for ever liable to the Uses to which it was conveyed, into whose hands soever, it might come; which would be a bar to the free alienation of property, and might tend to create a perpetuity. 2 Cru. Dig. 348. In reply to this, it is to be ob-

served, that the freedom of a limitation from a destructibility, which would be *tortious*, (as in the case supposed) can never make it tend to a perpetuity, if not, of itself, having that tendency; as the law never regards the possibility of wrongful acts as affording any argument either in favor of or against the validity of a gift, in point of remoteness. If the Uses are void, as tending to a perpetuity, the invalidity arises from no such merely extrinsic consideration as that of their not being within the scope of a supposed tortious act.

(x) F.C. R. 524. 1 Jarm. Wills. 788.

in the former case, if land be limited to the use of A. for life, and after his and B.'s decease, to C.; and A. die (whether immediately after the execution of the deed or otherwise) living B.; C.'s remainder will fail, and not be supported, by being construed as a Springing Use. But if a devise be made to A. for life, and after his decease, to the heirs of J. S.; and A. die in the testator's lifetime, J. S. being also alive; the limitation to the heirs of J. S. will be preserved as an Executory devise, although it would fail as a remainder; or, in other words, the subsequent limitation, if the contingency has not then happened, will, at the testator's death, be in the same condition, as if it had been originally limited without any preceding freehold. (a)

5. Another rule applicable to some classes of the future limitations under consideration is one which binds Springing and Shifting Uses and Executory devises, alike; and one, too, which, in the language of Lord *Kenyon*, (b) has uniformly prevailed without any exception to the contrary. It is, that whenever a future interest in land is so limited or devised, as that it *may* take effect as a remainder, either vested or contingent, it shall never be construed to be a Springing or Shifting Use or Executory devise. (c) Thus, if land be limited in use, or devised, to A. for life, and after the decease of A. and B., to C. in fee; this is a contingent remainder to C., and the limitation shall not be supported

5. Whenever a future limitation may take effect as a remainder, it cannot be construed a Springing or Shifting Use, or Executory devise.

(a) *Doe v. Carleton*, 1 Wils. 225. *Hopkins v. Hopkins*, 1 Atk. 581. C. Temp. Talb. 44. *Doe d. Scott v. Roach*, 5 Man. & Selw. 482. And this rule holds, although the inceptive operation of the ulterior gift as a remainder is the consequence of a *rule of construction* applicable to the limitation; and although the event contemplated by the will, and provision for which raises the construction in question, be the very event which happens in the testator's life, and one,

moreover, which would have been too remote for the creation of an Executory devise, at the date of the will. See *Doe d. Scott v. Roach*, *supra*.

(b) In *Doe v. Morgan*, 3 T. R. 763.

(c) *Purefoy v. Rogers*, 2 Saund. 380. *Carwardine v. Carwardine*, *ubi supra*. *Doe v. Morgan*, *ubi supra*. F. C. R. 386—395. 1 Prest. Abst. 130. Sugd. Gilb. Uses and Tr. 171, 172.

as a Springing Use or Executory devise, in the event of A.'s decease in the lifetime of B., which will prevent its taking effect as a *remainder*. (d)

So, if a limitation or devise be made to A. for twenty years, if he shall so long live, and after his decease, to B.; B. has a contingent remainder, which will fail in the event of the expiration of the term in A.'s lifetime. Or, again, if a person limit or devise property to A. and B., for their *joint* lives, or to C., for the *joint* lives of A. and B., and after the decease of both A. and B., to D.; D. takes a contingent remainder, which will fail, unless in the most improbable event of the simultaneous extinction of both the *cestuis que vies*.

There is, also, another case, of very frequent occurrence, in which the application of this rule is strikingly manifest. Where there is a limitation-over after a preceding gift to a person and his heirs, and there are words in the will by which the limitation to the *heirs* can be restrained to mean *heirs of the body* only, the first estate will be construed to be an estate-tail, and the limitation-over, a remainder. Thus, if land be given to A. and his heirs, provided that if he die without heirs of his body, it shall be to B. in fee. There, the limitation-over manifests, that the persons intended in the gift to A. and his heirs, were A. and his *issue*, and that in case of failure of such issue, B. should take. Both these purposes are served by restraining the word "heirs" to mean "heirs of the body;" and, so, raising an estate-tail in A., with a remainder in fee thereon to B.; which is the legal construction put upon the limitation. In a deed, this alteration of an express limitation in favor of intention is not admitted to the same extent as in wills (as will be seen more at large hereafter); (e) but in the case put, the construction in question obtains equally in both classes of instruments.

(d) 1 Prest. Abst. 130. Sugd. Gilb. (e) *Vide infra*, cap. 15.
Uses and Tr. 172.

6. We have before seen, (f) that it has been a matter of controversy, whether limitations by way of Springing and Shifting Use (not being Powers of revocation and new appointment merely,) are allowable in surrenders of customary or copyhold estates; and that, perhaps, the point cannot even yet be considered, as other than a *vexata questio*, although there is the strongest probability of its being determined in the affirmative. No such doubt has ever attached to the validity of *Executory devises* of copyhold estates, which are allowed in the same manner, and to the same extent, as in the case of freeholds. (g) The great inconsistency of allowing limitations of copyholds in last wills, similar to Springing and Shifting Uses, and rejecting such limitations in surrenders, is apparent. How did all devises of copyhold lands, prior to the recent statute, 1 Vict. c. 26, take effect? By virtue of the power conferred by the Statutes of Wills? Certainly not: for those statutes only extended to lands held by knight-service and in socage. How then was a testamentary power acquired? Only upon the principle of a surrender, to the *Uses declared* by the copyholder's will, and of his will operating as a *declaration of the Uses* of such surrender. The testamentary disposition of copyholds bore no affinity to the statutory devise of freeholds, and more nearly resembled the devise of a Use prior to the statute, 27 Hen. 8; which operated as a direction, by *cestui que use*, to the party having the legal estate, to stand seised to the use of the testamentary nominee. Since, then, limitations in wills of copyhold estates, resembling Executory devises of freeholds, have never been questioned, how comes it that there should be any doubt as to the validity of Springing and Shifting Uses in surrenders *inter vivos*? It may, perhaps, be matter for consideration, whether even in *wills* of copyholds, such limitations ought, on strict

6. Doubtful, whether Springing and Shifting Uses may be limited in copyhold surrenders; but certain, that copyholds may be the subject of an Executory devise.

(f) *Vide supra*, p. 64, et seq.

(g) *Brian v. Cawson*, 3 Leo. 116.

Willcock v. Hammond, Cro. Eliz. 204;

S. C. sub nom. *Willcock v. Hammond*, cited 3 Rep. 20 b.

principle, to be admitted, recollecting that such wills are but declarations of Uses. But, having been admitted, no reason can be assigned for restricting them to wills only. Nor is this argument affected by the statute 55 Geo. 3, which dispensed with the necessity of an *actual* surrender to the use of a will; for the *principle* on which the operation of a will of copyhold lands was grounded, remained the same after, as before, the statute; the statute in all cases *supplying* the surrender. But it is admitted, that as to all wills governed by the provisions of statute, 1 Vict. c. 26, the analogy between them and surrenders *inter vivos*, fails; a *direct* testamentary power over copyhold property being conferred by that act, independently of the existence, or presumptive existence, of a previous surrender. But the increased facility of testamentary disposition cannot diminish the force of the argument derived from a long-existing and well-ascertained analogy between the different modes of alienation of copyhold estates. Until, however, a precise adjudication shall have decided the point, the validity of Springing and Shifting Uses in surrenders of copyhold estates must be considered doubtful: and, therefore, a further difference must be noted, between such limitations and Executory devises.

7. On the vesting of a Springing or Shifting Use or Executory devise not carrying the whole interest, all subsequent Executory limitations take place as remainders.

7. When a Springing or Shifting Use or Executory devise, not carrying or embracing the whole interest, *vests*, either in possession or in interest, all the subsequent Executory limitations become remainders expectant upon it, and their validity and operation will be decided by the rules applicable to remainders, in the same manner as if the preceding Executory limitation had been originally created as an immediate particular-estate, and the subsequent limitations, as proper remainders to take effect after it.

8. On the happening of the contingency on which an Executory limitation depends, it will, if

8. Closely allied with the preceding rule, is another, to the effect, that immediately the contingency, on which the future interest is limited to arise, happens, it shall (if so capable with reference to the quality and nature of the preceding estates,) be construed to be, and take effect as, a

remainder; and no subsequent accident will make it enure as a Springing or Shifting Use or Executory devise: and it will, of course, like a strict contingent Use, be subject to all the rules governing remainders at Common law. (*h*)

possible, take place as a remainder, and stand or fall as such.

9. It is, further, a well-established rule, that when one limitation, either in use or by devise, is executory or future, all subsequent limitations must be so likewise, until the time comes for the first estate to vest or fail, when all the limitations to persons *in esse* and ascertained may vest, and no longer continue executory or future. (*i*)

9. All limitations subject to one which is Executory are also Executory.

10. A limitation after a previous Future Use or Executory devise, *not carrying the whole interest*, may be good, either as a remainder expectant upon, or as an alternative Future Use or Executory devise to take effect in case of the failure of, the preceding Executory limitation, at the time originally appointed for it to arise. (*k*) As, if limitations be made to A. in fee, provided that if he die under twenty-one, then to the heirs of his body, and, if there be none such, to B. and the heirs of his body. Here, if A. die under twenty-one, leaving issue, such issue will take estates-tail, with a vested remainder to B. in tail; and if A. die under twenty-one, without issue, then B. will take an immediate estate-tail by way of Shifting Use, or Executory devise. During the minority of A., the nature of the limitation to B. and the heirs of his body is undecided, independently of the possibility, that both it and the limitation to the heirs of the body of A. may be defeated, by A.'s attainment of the required age. Immediately on A.'s death, under that age, the ulterior limitation either takes effect in possession, as a Shifting Use or Executory devise, or vests in interest as a remainder, expectant on the estate-tail in the issue of A.

10. Limitations after an Executory limitation not carrying the whole interest may take effect, either as a remainder, or as an alternate Executory limitation.

Where the first Executory limitation comprises the *whole* But if first

(*h*) Sugd. Gilb. Uses and Tr. 177.

(*k*) *Doe v. Fomereau*, Dougl. 487.

(*i*) 2 Prest. Abst. 165.

F. C. R. 606.

Executory limitation embraces whole interest, subsequent limitation cannot take effect as a remainder,

fee, a subsequent limitation engrafted upon it, can only have effect as an alternative Springing or Shifting use, or Executory devise, to vest in case of the failure of the one first limited, at the time originally appointed for it to vest. Thus, if land be limited or devised after seven years, to A. in fee, provided that if he be then dead, or be not then married, to B. in fee. In this case, if A. survive the seven years, or marry in the meanwhile, he will, of course, take the fee, and B.'s interest will not arise; if A. die within the seven years, or survive the term, being still unmarried, B. will become entitled, under the alternative Springing use or Executory devise.

Independently of these alternative Executory limitations, there may, of course, be future gifts contemplating events affecting the person taking under the first Executory limitation, and assuming that such limitation *has previously vested*, or even taken effect in *possession*.

11. Persons may take jointly under an Executory limitation, though not all becoming capable at the same time.

11. Where land is limited by way of Springing or Shifting Use or Executory devise, to several persons, or to a class of persons, and such persons do not all become capable of taking at the same time; as in the case of a limitation to the unborn children of a person *in esse*; they may, nevertheless, all take jointly, if such be the intention. This is impossible at the Common law, as has been before observed.

12. The influence of the old doctrine as to limitations *per verba de presenti* and *per verba de futuro*, upon Springing and Shifting Uses and Executory devises.

12. It was formerly held, that where an Executory devise or Springing Use was limited *per verba de presenti*, that is, where the devisee or *cestui que use* was mentioned as a person in present existence, and the commencement of the estate devised or limited was not expressly deferred to a future period, the devisee or *cestui que use* must be a person capable at the death of the deviser, or the date of the deed, or otherwise, the devise or limitation would be void. (1)

(1) F. C. R. 532, *et seq.* And as to copyholds, also, Lord C. B. *Gilbert* says:—"A copyholder surrenders to the use of the right heirs of J. S.,

he being alive; void; for it cannot take effect *in presenti*, as he would have it." *Treatise on Tenures*, 264, 265.

Thus, where (m) there was a devise to A. for fifty years, if he should so long live, with remainder to the heirs male of the body of A.; the Court evinced an inclination to the opinion, that the ulterior limitation was not a good Executory devise. And, so, where (n) there was a devise to trustees for eleven years, and then to the first son of B., then unborn, it was said, that the limitation to the first son of B. should not enure as an Executory devise, because limited *per verba de præsenti*. In neither of these cases, however, was there any necessity for an actual decision on the point. And, so, where (o) there was a present limitation of a use which the *cestui que use* could not take *in præsenti*, it was said, that the use should not arise in his favour, as a Springing Use *in futuro*; *sed aliter*, where it was future, as to the right heirs of B., *after his death*. Upon this principle, a devise to an infant *en ventre sa mère* was, by some, deemed void; (p) although, on this point, doubt has long ceased to exist, it being now undeniably settled that such a devise is good. (q) With reference to this supposed distinction between limitations *per verba de præsenti*, and *per verba de futuro*, it is observable, that though supported by many *dicta*, it has never been so far judicially confirmed, as to be entitled to the rank of a settled rule in the construction of limitations by way of devise and future use. The eloquent author of the treatise on *Contingent Remainders and Executory Devises* thus (r) observes upon the doctrine:—"In the infancy of Executory devises, before their limits were ascertained and established, and whilst they were scarcely yet distinguished from limitations in conveyances at Common law, there is no wonder that a distinction of this nature should have been taken, and that it should have prevailed to a kind of *rigid*

(m) *Goodright v. Cornish*, 1 Salk. 226.

(n) *Scattergood v. Edge*, 1 Salk. 229.

(o) *Lamb v. Archer*, 1 Salk. 225. Com. Dig. tit. Uses, K 7. Sogd.

Gilb. Uses and Tr. 168.

(p) 1 Lev. 135. F. C. R. 532.

(q) 1 Freem. 244. *Guliver v. Wichett*, 1 Wils. 106.

(r) P. 534.

absurdity, in order to guard against and prevent too great a freedom and latitude, in what was then esteemed an innovation upon the old Common law; but even then, it seems to have been grounded upon some *supposed*, or upon the want of some *required* evidence, of the testator's intention, as appears in the several cases put by the Court in the places above cited, from *Salkeld* and *Raymond*." And the same writer, after stating that a devise to an infant *en ventre sa mère* is at this day clearly good, thus (s) sums up his observations upon the doctrine in question:—"Whatever force is to be allowed to the distinction between Executory limitations *per verba de præsentis*, and *per verba de futuro*, it can only affect those cases where there is not the least circumstance from which to collect the testator's contemplation or intention of anything else than an immediate devise to take effect *in præsentis*."

13. As to the transmissibility and alienability of interests created by Executory limitations.

13. The last rule to be here noticed, in reference to Springing and Shifting Uses and Executory devises, is, that all Executory estates and possibilities accompanied with an interest, which would be descendible to the heir of the object of them, dying before the contingent event on which the vesting of the estate depends, are *devisable*, (t) transferable or *assignable* in equity, (u) and may pass by *fine* by way of estoppel. (v) And the very terms of the hypothesis render it unnecessary to observe, that these future estates are transmissible to the heirs or executors (w) of the devisee or *cestui que use*, where he dies before the contingency happens, and there is no uncertainty in the *object* of the limitation. (x) With reference to the transfer of future contingent interests

(s) P. 536.

(t) *Selwyn v. Selwyn*, 2 Burr. 1131.
Roe v. Griffiths, 1 Bl. Rep. 605.
Moor v. Hawkins, cited 1 H. Bl. 33;
 3 T. R. 88. *Roe v. Jones*, 1 H. Bl.
 30; 3 T. R. 88. F. C. R. 367.

(u) *Wright v. Wright*, 1 Ves. sr.
 409. F. C. R. 366, 548.

(v) F. C. R. 365. 5 Cru. Dig.
 202. 6 Ib. 522. *Vide Bro. Abr.*
tit. Fines, pl. 109.

(w) *Goodright v. Searle*, 2 Wils.
 29. *Wood's case*, 8 Vin. Abr. 112.
 1 Rep. 99 a. F. C. R. 364.

(x) *Moorhouse v. Wainhouse*, 1 Bl.
 Rep. 638. And see F. C. R. 370.

in *copyhold* lands, it is to be observed, that a statutory fine has never been allowed to be levied of copyholds, and that a *surrender* will not have an analogous effect to a fine in respect of freeholds; for a surrender, where *no estate* passes, cannot operate by *estoppel*. (y)

We have thus taken a brief view of the various rules relating to limitations by way of Executory devise and Springing and Shifting use. Nearly contemporaneous in their origin, similar in their nature, and closely allied in their practical tendency, we yet see that the judicial favor and support have been extended by far the most liberally to the testamentary class of these limitations. In the case of limitations upon instruments *inter vivos*, the Courts have required a certain degree of attention to the order and course of the Common law, although violating many of its fundamental rules; whereas, in the case of limitations in last wills, it is, perhaps, not affirming too much, to say, that, however informal, untechnical, and indefinite, they will, if necessary, be allowed to take shelter under the comprehensive law of Executory devise.

(y) *Goodtitle v. Morse*, 3 T. R. 365. *Taylor v. Phillips*, 1 Ves. sr. 229, 230. 1 Scriv. Copy. 168. In Mr. Preston's *Essay on Abstracts*, vol. 1, p. 341, there is an expression which leads to the inference, that in his opinion, the inoperativeness of a surrender on contingent interests in copyholds, depends on the question of the certainty or uncertainty of the surrenderor being the person who may ultimately become entitled, under the limitation, if it takes effect at all; and that, if a release would pass the interest, being of *freehold* tenure, a surrender will bind it by estoppel, if of copyhold tenure. The learned gentleman's words are:— "A surrender will not operate by way of estoppel, so as to bind any interest, which, if of freehold tenure, could not be bound by release; as an expectancy

of an heir, a contingent remainder to a person not ascertained; as the survivor of husband and wife, or a class of persons who are to answer a given description, as children of A., who shall survive B., who is still alive." It is conceived, that the inference seemingly arising from this observation, is one at variance with all rule and authority; and that, although the copyholder's possibility be accompanied with an interest, (and in the case of freeholds, therefore, would be bound by release or fine,) yet if he be not in the customary *seisin*, his surrender, which passes only what the surrenderor has at the time, will not operate by way of estoppel. *Vide Doe d. Baverstock v. Rolfe*, 8 Ad. & Ell. 673.

CHAPTER X.

OF THE NECESSITY FOR A RULE FIXING LIMITS TO THE REMOTENESS OF LIMITATIONS OF SPRINGING, SHIFTING, AND FUTURE USES, AND EXECUTORY DEVISES AND BEQUESTS, AND TRUSTS OF THE LIKE NATURE.

At first, doubted whether Springing, Shifting, and Future Uses were destructible.

This uncertainty accounted for.

MUCH conflict of opinion appears (a) to have existed, shortly after the passing of the Statute of Uses, as to the destructibility of Springing, Shifting, and Future Uses, by the recovery, fine, feoffment, or other act, of the owner of the fee for the time being.

This confusion may be traced to the non-observance of the distinction between *contingent* Uses by way of *remainder* after a preceding limited estate, and limitations which defeat, or take effect in partial derogation of, a previous fee or freehold. Little argument is required to prove, that the former are necessarily liable to the tortious acts and alienations of the tenant of the particular-estate, because the Statute of Uses having converted Uses into legal estates, those estates, so far as they may take effect as limitations at Common law, are liable to all the restrictions and contingencies allowed, and, therefore, in a manner imposed, by the rules of the Common law. A contingent remainder at Common law being destructible by the determination of the particular-estate (by forfeiture, merger, or otherwise,) previous to its vesting, the same consequence must attach to the contingent Use since the statute. The analogy,

(a) Sugd. Gilb. Uses and Tr. 286 n.

however, extends no further; because there are no limitations known to the Common law, resembling Springing, Shifting, and Future Uses. "The not attending to this distinction," as Serjeant *Hill* observes, (b) "occasioned great confusion;" it being sometimes laid down, that Future Uses were liable to all the acts of the owner of the fee, in exactly the same manner, and to the same extent, as contingent remainders at Common law.

After a while, however, a general opinion appears to have prevailed, that Springing, Shifting, and Future Uses were indestructible by the fine, recovery, feoffment, or other wrongful alienation, of the owner of the fee for the time being. (c)

Eventually settled that such limitations are indestructible.

As regards a *common recovery*, it was said, that a Springing or Shifting Use was but a mere possibility or future expectation of an interest, to which the assumed recompence (the very life-blood of a recovery) did not extend; and that, therefore, none of the fictions on which the force and operation of recoveries were grounded, furnished any reason for the recovery of a stranger being a bar to these possibilities, or future interests. The writer has been unable to discover any case, in which the effect of a common recovery on Springing and Shifting Uses has been *actually decided*; though, as will be hereafter seen, the rules which have been established on this subject in respect to Executory devises, are applicable to and decisive of every case on Future and Shifting Uses, and other Springing and Executory interests. (d) It is laid down in the *Practical Counsel*, (e) that if lands be given to A. and his

—By a common recovery.

(b) Opinion in margin of *Viner*, stated in *Sugd. Gilb. Uses and Tr.* 290 n.

(c) See 1 *Sand. Uses*, 145, 153; *Sugd. Gilb. Uses and Tr.* 127 n, 159 n, 287; 4 *Cru. Dig.* 496; *Powell's* note to *F. C. R.* 5th edit. 67 n.; *Com. Dig. tit. Estates*, B 30; Serjeant

Hill's opinion, *ubi supra*; *Harg. Law Tracts*, 518. And see *Kent v. Steward*, *Cro. Car.* 358; *Smith v. Warren*, *Cro. Eliz.* 688.

(d) 12 *Mod.* 39. *Sugd. Gilb. Uses and Tr.* 156 n.

(e) *Pp.* 206, 207. And see *Fig. Recov.* 129—134.

heirs, till B. pay to him 100*l.*, and then that it shall remain to B. and his heirs; and A. suffers a common recovery, and vouches the common vouchee; that this is no bar to B. and his heirs, but that upon payment of the 100*l.*, he may have the land.

If the reason of this rule be inquired into, it must be confessed, that there does not appear the slightest valid ground, on which to refuse to common recoveries the same operation on Executory interests, by way of Springing and Shifting Use, which universally attends them in respect to remainders, and other limitations, after estates-tail; and it seems strange, that the comparatively light estimation in which Future Uses are regarded by the law, should be the very argument urged for their escape from the force and effects of a common recovery. Surely, no reason, which renders vested remainders and reversions barrable by a recovery, can diminish in weight, in proportion as the future interests in question become more insignificant? It is acknowledged, that the supposed recompence extends only to the *issue*, even in the case of an estate-tail, and the fictions, upon which is grounded the destructive effect of *common recoveries* on the *remainders* and *reversions* after an estate-tail, are certainly not *more* preposterous in the case of a tenant in fee, subject to Springing and Shifting Uses. (*f*) If, in the case of an estate-tail, the recoveree is supposed to be in of his estate-tail, and that estate-tail, by like supposition of law, continues for ever, and so the remainders and reversion are prevented from ever coming into possession; (and these are the fictions upon which the force of a recovery as regards remainders and reversions rests;) what valid reason is there against the presumption of the same, or analogous fictions, in the case of tenant in

(*f*) These observations are not made with the view of showing the propriety of Springing and Shifting Uses being rendered destructible by the owner of the fee; but solely for

the purpose of evincing the absurdity of any supposed distinction between the force of a recovery on remainders, and on future uses.

fee, subject to Future Uses? Indeed, the integrity of the arguments urged for the indestructibility of Springing and Shifting Uses, by the recovery of the owner of the fee, is strongly assailed by the fact, that, in the case of an *estate-tail*, such interests share the general fate of all limitations, subsequent to the estate of the recoverer, tenant in tail; (g) as is manifest from the very frequent case of Shifting Uses, engrafted on an estate-tail, for divesting it on the accession of other estates, or on the refusal of tenant in tail to take and bear any particular name and arms; which are clearly destructible by his recovery.

It is to be noted, however, that when the person who will at all events become entitled under the Executory limitation (should it take effect at all) is ascertainable, and that person comes in as vouchee, under the recovery suffered by the owner of the preceding fee, it seems that the possibility is, in that case, effectually destroyed.

Springing and Shifting Uses enjoy a like immunity from —By a fine. the tortious operation of a *fine* levied by the owner of the fee, prior to its vesting in possession or remainder, unless there be a non-claim for five years after the right of possession accrues. (h) Thus, it is laid down, (i) that, “an interest, not vested, shall not be barred by a fine, as if a lease be made to commence *in futuro*, a fine and five years non-claim, before the term commences, is not a bar.” And where (j) lands were limited to the use of A. for life, and if B., his wife, survived him, and had issue then living, then she to have a rent-charge of 20*l.*, and from the death of both, the heirs of the body of them to have an annuity of 20*l.*; and a fine was levied by A. and B.: it was held, that these were two distinct rents, (k) and that the fine was no bar to the rent to the heirs of the body, which was

(g) See 1 Prest. Abst. 40.

(j) *Whitfield v. Fauasett*, 1 Ves.,

(h) Burt. Elem. Comp. 71. 5 sr. 387.

Cru. Dig. 219.

(k) As to this, see Butler's note to F. C. R. 528, 529.

(i) Com. Dig. tit. Fine, I 3.

in the nature of a Springing Use of the rent not arisen, but a mere possibility which could not be barred. In another case, (*l*) upon a marriage, an estate was settled by the wife and one of her sisters, in strict settlement, with the ultimate remainder to the husband in fee, subject to a proviso, shifting the estate to the right heirs of the wife, if there should be no issue of the marriage living at the decease of the survivor of them, which event happened. The husband and wife, after the marriage, levied a fine, for the express purpose of destroying the Shifting Use. It was decided, in Dom. Proc., (reversing a decision of the Court below,) that the fine could not bar the benefit of this proviso, for that the same never was, nor ever could be, in the wife, who levied the fine.

Indeed, the destructibility of a Future Use by fine and five years' non-claim after the Use arises, is not a matter of certainty; (*m*) although the weight of authority, (*n*) and the terms of the Statute of Fines, (*o*) seem to favor such a conclusion. (*p*) A fine at *Common law*, (which works by discontinuance,) would, assuredly, be inoperative on such future interests, by analogy to the rule and doctrine of law respecting the effect of a common recovery, above-considered.

(*l*) *Lloyd v. Carow*, Show. Parl. Ca. 137.

(*m*) Sheph. Touchst. 22. Burt. Elem. Comp. 70.

(*n*) Plowd. 373 a. 1 Taunt. 607. 6 Taunt. 270.

(*o*) 4 Hen. 7, c. 24.

(*p*) See the argument in the case of *Romilly v. James*, 6 Taunt. 262, in which the destructibility of an Executory devise by a fine levied by the prior devisee was fully discussed; although, from the turn the case took, it was unnecessary for the judges to decide the point. The main argument urged against the tortious effect

of a fine on an Executory devise, was, that a fine never operated, where it divested or turned to a right no estate; and that when it was levied before the commencement of the Executory devise, it could not be attended by this displacing or divesting effect. But it has been aptly observed, in reference to this argument, that it "loses much of its force, when it is considered, that a Springing Use (or Executory devise) is from the beginning little else than a right, or that which a divested estate becomes." Burt. Elem. Comp. 71.

It may here be remarked, that the assurances substituted for fines and recoveries, by the statute, 3 & 4 Gul. 4, c. 74, have no greater force or more extensive operation, under the provisions of that act, than belonged to the old modes of assurance thereby abolished. An enrolled conveyance, therefore, by tenant in fee, subject to limitations over, in the nature of Springing and Shifting Uses, will be attended with no greater force as respects such interests, than was consequent on a fine or recovery levied or suffered under similar circumstances, prior to the commencement of the operation of the new law. Indeed, it remains to be seen, whether, in one respect, an assurance under the Disentailing Act will not be *less* efficacious than a Statute Fine; namely, in the important question of *non-claim*. There is no provision in the act communicating to assurances made in pursuance of it, the divesting and destructive force belonging to fines under the old law; and the general enabling clause is confined to assurances executed by tenants in tail. It would, therefore, seem, that an assurance under this act by a tenant in fee, subject to a Springing or Shifting Use, will have no greater force, as regards such an interest, than an ordinary conveyance by lease and release, or bargain and sale, which would, in this respect, be clearly nugatory.

And, therefore, by the assurances substituted for them by 3 & 4 Gul. 4, c. 74.

For the same reason, that they are mere possibilities in law, Springing, Shifting, and Future Uses are, further, not liable to be destroyed or divested by the *feoffment* of the first taker, or other party seised of the fee for the time being. (q) Thus, that assurance, the divesting force of which is generally stronger than that of any other assurance, (and *that*, without any regard to the estate or interest of the feoffor,) yet fails of affecting, in the smallest degree, the subtle and pliable Future Use.

—By feoffment.

It may be observed, that although there are but few Observation as

(q) *Mullineux's case*, Trin. 42 Eliz., cited Palm. 136. 2 Sand. Uses. 12, 13.

to the paucity of express authorities on these points.

The indestructibility of future Uses the parent of the Rule against Perpetuities.

This shown from the evils of remote future interests in property.

cases in our Reports, in which the effect of a common recovery, fine, or feoffment, on Future Uses, has been the direct subject of adjudication, there are many decisions which have proceeded, and been expressly grounded, on the assumption, of the indestructibility of such Uses by any assurance, however tortious, of the owner of the previous fee or freehold. (*r*)

This general characteristic of Springing and Shifting Uses—their indestructibility or indefeasibleness—was one of the producing causes of those wholesome restrictions on the power of creating future interests in property, comprehended in the *Rule against Perpetuities*. (*s*)

If, by means of Shifting Uses, a future interest in realty might be limited to arise, divesting prior estates *at any period of time*, however remote; or, if through the medium of Springing Uses, a future estate might be created to arise on events, either certain or contingent, *without any limit* in regard to the *time within which* such events should happen; or, if by virtue of Powers of revocation and new appointment, the right to create future estates could be *indefinitely* reserved, either to an interested person, or a stranger;—if *such* limitations should be allowed, it requires little argument to prove, that the perpetuity of entail, the mischievous tendency of which led the judges to evade the Statute *De donis conditionalibus*, by the invention of common recoveries, would be revived, in all its force and hurtfulness, under the guise of Springing, Shifting, and Future Uses. (*t*)

(*r*) *Carwardine v. Carwardine*, F. C. R. 388. *Doe d. Scott v. Roach*, 5 Man. & Selw. 482.

(*s*) *Harg. Co. Litt.* 271 b. n. 1, s. iii. 2.

(*t*) "The reception of Executory Uses into the law of England gave rise to that important part of its jurisprudence, which respects the *doctrine of perpetuity*, or *excessive restraint on alienation*. No question of perpe-

tuity could arise at the Common law, or under the Statute *De donis*. After the Statute *De donis*, and before the introduction of Executory Uses, future estates could only be created by way of remainder. The remoteness of a remainder, however great, was no objection to it on its creation. If the event upon which it was to vest, took place during the continuance of the preceding estate, or at the instant of

It is in the nature of such limitations to "hang like a cloud" over the estate, impeding its free transmission by the uncertainty of future enjoyment, and, therefore, to that extent, obstructing that mutual interchange between land and money, which, in a country whose prosperity is derived from its soil and commerce alike, is so essential to the interests of all, whether landholders, or merchants and those engaged in trade.

The injurious effects of indestructible Executory limitations being ascertained, there could be little difficulty in inventing a remedy. As by the establishment of common recoveries, the judges of the Common law obviated the hurtful tendency to a perpetuity in an unbarrable entail, and have ever since evinced their jealous care for the free exercise of this mode of unfettering estates-tail, or its substitute; so, it is obvious, that the same regard for the free circulation of property would lead them, in some way or other, to avoid the ill consequences which would ensue from the prevalence of unrestrained and unlimited perpetuity, under the form of Springing, Shifting, or Future Uses. If their ingenuity could suggest a mode of avoiding and almost repealing a legislative enactment, (the Statute *De donis*) on account of its pernicious tendency; the judges could be at no loss to devise some bounds, within which to confine those limitations of Uses, which owed their existence to *judicial*

The feasibility of an adequate remedy.

its determination, the remainder would vest in possession immediately on the determination of the preceding estate; if the event did not take place during the continuance of the preceding estate, or at the instant of its determination, the remainder would wholly fail of effect: during this period, therefore, of our law, all inquiry respecting perpetuity was out of question. After the introduction of Executory Uses, the question of perpetuity necessarily forced itself on the attention of the Courts. The introduction of fines,

and, still more, the introduction of recoveries, which originated in an arbitrary decision of the judges, in direct opposition to a positive statute, sufficiently showed, that such a modification of property, as rendered it perpetually inalienable, or postponed the power of aliening it, to a period necessarily remote, would not be endured. It was, therefore, incumbent on the Courts to fix the boundary, beyond which Executory limitations should not be permitted to operate." Butl. note to F. C. R. 565, 566.

favor alone, and thereby to restrain their tendency to a perpetuity.

Early apprehension of the evils of perpetuities, or remote estates, vague.

Accordingly, in almost every case of Future Use which arose, (after the lapse of some little time from the passing of the statute, 27 Hen. 8,) we find mention of "perpetuity," or reference to it; and *that*, too, frequently, where, from the nature of the limitations in question, there was little or no tendency to it. The notion which prevailed of a perpetuity was vague, general, and undefined; and the language of the old sages of the law regarding it, would convey but an inadequate idea of the monster, which was held up for execration by bench, bar, and suitors alike. The suspension of the enjoyment or vesting of property for a few months, would call forth the apprehensions of our lawyers, with as much earnestness, as if the months had been lives or generations. The settlement of any definite rule, as to the time within which Future Uses should arise, was progressive and slow; and in the marking out these limits, as occasion from time to time required, not a little inconsistency is observable. Even after a certain latitude had been once allowed, we sometimes find a subsequent retraction or retrogression; so unstable were the principles, and so undefined the ideas, which had been formed or were entertained upon the subject. Nor has the ingenuity of *modern* lawyers been much less exercised in the discovery of the *ultimum quod sit*, or *ne plus ultra* of perpetuity; for, strange as it may seem, but ten years have elapsed since the fixation of that *ultimatum* took place. (u)

Having discovered the necessity for restraining limitations of Future Uses, within reasonable limits, we will proceed to prosecute a similar inquiry in regard to *Executory devises and bequests*.

The case which fixed the legality of

The same adjudication which finally established the validity of Executory devises, likewise created the necessity

(u) See *Cadell v. Palmer*, 7 Bligh. N. S. 202, stated *infra*, p. 159.

for the imposition of some restraint on them. In the before-cited (v) case of *Pells v. Brown*, it was decided by three judges against *Dodderidge, J.*, that a recovery suffered by the person to whom the determinable fee was limited, did not bar or destroy the Executory interest, because he who suffered the recovery had a fee, and the ulterior devisee had no estate depending upon that of the former, but a mere collateral possibility, which could not be touched by a recovery. (w) *Dodderidge, J.*, held the recovery a bar to the Executory devise, because it was but a possibility to have a fee, and, *quasi*, a contingent estate, which was destroyed before it came *in esse* by the recovery, for otherwise it would be a mischievous kind of perpetuity, which could not be barred.

Executory
devises also
adjudged them
unbarrable by
common
recovery.

Ever since the decision in the case of *Pells v. Brown*, an Executory devise of inheritance has been deemed unbarrable by the common recovery of the owner of the prior estate; (x) and if there have been but few subsequent cases, in which the point has been discussed, (y) there are many in which it has been assumed (z) as indisputable.

And ever since
so settled.

The reasons assigned for the exclusion of Executory devises from the operation of a common recovery, are the same with those on which the like exemption of Springing and Shifting Uses is grounded, and are open to the same observations as have been offered in relation to the destructibility of those Uses by common recovery. Disregarding "the unattainable subtlety of the reasoning" (a) urged for the unbarrableness of Executory devises, as a fruitless attempt to prove, on legal *principles*, the correctness of a rule resting only on *arbitrary* decision, the true and only ground of the rule, is, a favorable "consideration of the utility of

Integrity of
the reasons
urged for this
indestructibi-
lity assailed,
and doctrine
rested on its
true founda-
tion.

(v) *Vide supra*, p. 81.

(w) And see 2 Rol. 394; 1 Lev. 136.

(x) Hargr. Law Tracts, 518.

(y) *Doe d. Barnfield v. Wetton*, 2

Bos. & Pull. 324.

(z) *Wrinkle v. Billington*, Dougl. 729. *Doe d. Cadogan v. Ewart*, 7 Ad. & Ell. 647.

(a) 2 Harg. Jurid. Arg. 34.

these limitations, in enabling men thereby to make provision for payment of debts, younger childrens' portions, and other necessary family arrangements, by giving over the estate on non-compliance with such imposed conditions." (b)

The fictions of the Executory devisee not being within the presumed recompence in a common recovery,—of the law not taking any notice of the possibility of an estate arising after a fee, (a fiction belied by the very existence of the Rule against Perpetuities,)—and of the infinite duration of the previous determinable fee in the eye of the law,—these are all reasons ingeniously invented, for propping up, by a kind of *ex post facto* justification, a doctrine adopted, in reality, for convenience only.

Interest of
Executory
devisee is
barred, if he
concur in the
recovery.

It was resolved, however, in the case of *Pells v. Brown*, that "if the person, to whom an Executory devise is limited, come in as vouchee in a common recovery, his possibility is thereby given up:"—in order to support which exception, reasons have been urged, (c) fatal, in the writer's view, to the validity of the arguments for the protection afforded to Executory interests, where the Executory devisee does not concur, as vouchee.

Executory
devisees inde-
structible by
fine.

It has generally been laid down, that Executory devisees are not destructible by *fine*; (d) unless there be five years' non-claim after the time of the Executory interest accrued, in which case, it should seem, that the fine bars by the very words of the Statute of Fines (4 Hen. 7, c. 24). The writer has been unable to discover any decided case, in which the effect of a fine on an Executory devise, has been determined, but the mutual applicability of the authorities on Springing and Shifting Uses, to Executory devisees, and of the cases on the subject of Executory devisees, to Springing and Shifting Uses, renders the cases of *Lloyd v. Carew*, and *Whitfield v.*

(b) Powell's note to F. Ex. Dev., 4th edit., 67, note.

(d) Sugd. Gilb. Uses and Tr. 278, 288. 5 Cru. Dig. 219. F. C. R.

(c) See Powell's note to F. Ex. Dev. 70, 71.

418. Harg. Law Tracts, 518.

Faussett, before cited, (e) authorities for the position, that an Executory devise is unaffected by the fine of the owner of the determinable fee, until five years after the accruer of the Executory devisee's right. The principle of those cases was, that the fine was no bar, because the Springing Use was a mere possibility, which could not be barred ;—a principle, obviously, applicable to the case of an Executory devise, to the same extent in which it is applicable to Springing and Shifting Uses. (f)

An Executory devise is also indestructible by the *feoffment* or other *tortious alienation* of the owner of the fee for the time being. (g) Thus, where (h) one, by deed, granted several annuities to his younger children, and afterwards devised all his lands to his elder son and his heirs, upon condition that he paid the annuities, and if he failed of payment, that the youngest son should enter and have the lands; the eldest son entered and made a *feoffment* to A., and then the youngest son entered for nonpayment; and it was held, that his entry was lawful, and that the contingent estate was not divested. So, also, where (i) lands were devised to A. in fee, and, upon a contingency, to B. in fee, and A. made a *feoffment* in fee; it was held that the contingent right was not destroyed. The same reason—its being a mere possibility, or future expectation of an interest—which protects an Executory devise from the common recovery, and fine, also prevents its being divested by the *feoffment*, or other wrongful alienation, of the owner of the previous determinable fee.

And by *feoffment*.

But it must be observed, that all that has been here said respecting the indestructibility of Executory devises, must be understood of such Executory devises only, as are engrafted upon estates in fee-simple; it being perfectly

But Executory devises engrafted on estates-tail are defeasible.

(e) *Vide supra*, pp. 125, 126.

note, 292.

(f) See the arguments in *Romilly v. James*, 6 Taunt. 262, referred to, *supra*, p. 126, note.

(h) *Mullineux's case*, cited Palm. 136.

(i) *Purslowe v. Parker*, 2 Rol. Abr.

(g) Sugd. Gilb. Uses and Tr. 287,

793, pl. 2.

clear, that (like every other limitation) when limited after an estate-tail, they are barrable by the common recovery or disentailing assurance of the tenant in-tail. Thus, if land be limited to A. and the heirs of his body, and if A. should die under the age of twenty-two years, then, that immediately after his death, his estate shall cease, and the land belong to B. in fee, or in tail, a common recovery suffered, or enrolled assurance executed, by the tenant in tail, immediately on his attainment of the age of twenty-one years, and, of course, while his estate is continuing, will bar the Executory limitation.

Indestructibility of Executory devises also a creative cause of the Rule against Perpetuities.

This privilege of Executory devises, which exempts them from being barred or destroyed, is the foundation of restrictions imposed upon their creation, the same as those which bind Future Uses, and also, ordinarily known under the name of the *Rule against Perpetuities*. It is the inevitable tendency of limitations by way of Executory devise, as well as of Springing, Shifting, and Future Use, to operate as a clog upon the alienation of the inheritance, and to impair its value, by the uncertainty of enjoyment; and, unless the right to create those future interests were confined within reasonable limits, it would be in a settlor's or testator's power to make an estate inalienable for generations to come (*k*); a power which the law very wisely denies to every man, as the exercise of it would tend to render property, in a great measure, useless to the general purposes of a commercial country. As before observed, the limits thus imposed on Executory devises are the same with those within which Shifting, Springing, and Future Uses are confined; and the progressive extension of those limits, which it will be our business presently to trace, has been applicable to both kinds of limitations.

Executory bequests of

Executory bequests of *terms for years* and other *chattel interests in land* are equally secure, as Executory devises of

(*k*) F. C. R. 430.

real estates, against the disposition of the legatee of the antecedent interest. (l) And, as in the case of Executory devises, this doctrine of the indestructibility of Executory bequests, was established by the very same decisions which affirmed the validity of those limitations. Thus, the fourth resolution in *Manning's* case (m) was, "that after that the executor hath assented to the first devise, it lieth not in the power of the first devisee to bar him who hath the future devise, for he cannot pass more to another than he himself hath." And so in *Lampett's* case, (n) one of the questions raised, was, "if the first devisee, after assent made by the executor, might bar the Executory devise, being but a possibility, or not;" and the opinion of the judges was in accordance with the resolution in *Manning's* case upon the same point. And it is also clear, that in the case of an Executory bequest of a term of years after a previous limitation of the same for life, no subsequent union of the freehold or inheritance, with the interest of the first taker, nor a feoffment, nor any other tortious act, by such first taker, will destroy, or in any way affect, the interest of the ulterior legatee. (o) Thus, where (p) W. H., being possessed of a house for a term of thirty-one years, by his will devised the profits thereof to I. during widowhood, and afterwards devised the term to R. ; and I., by the assent of the executor, entered, and afterwards purchased the fee of the house devised: it was held, that although the whole term was in I. *quousque*, &c., so that by the purchase of the fee, *her* interest became extinct; yet the same did not defeat the Executory bequest to R., but that after the marriage of I., and not before, he might enter. And so, where (q) a person to whom a term was devised for life, with a limitation-over,

chattels real
indestructible.

By merger,
forfeiture, or
other act,
affecting
interest of
first taker.

(l) F. C. R. 420.

(m) 8 Rep. 96, *vide supra*, p. 85.

(n) 10 Rep. 47 b.

(o) F. C. R. 421.

(p) *Hamington v. Rudyard*, cited

10 Rep. 52. And see also *Lee v. Lee*, Moor, 268.

(q) *Cotton v. Heath*, Ro. Abr. 612, 1 Ab. Eq. 191.

made a feoffment of the lands, whereupon the reversioner in fee entered for the forfeiture; it was held, that the Executory bequest was not destroyed by the feoffment of the first taker, and the reversioner's entry for the forfeiture.

Exploded distinction as to this point, between bequest of a term to first taker, and devise of the land.

A distinction was, indeed, formerly taken between a bequest of an existing *term*, and a devise of the *land* for a term, in regard to the destructibility of the Executory interest by the first taker's possession of the inheritance, or by his tortious alienation.

It was said, that where a person having a term, devised his *term*, the *entire interest* in it vested in the first legatee for a certain time, and that, during that time, it was subject to his power, in the same manner as if there had been no limitation-over. (r) But, as Mr. *Fearne* observes, (s) however admissible such a distinction might have been before Executory devises of *terms* were established, and whilst a difference was supposed between the limitation of the term itself, and of the land or *profits*, or *use*, or *occupation*, &c., all pretence for it evidently vanished in *Manning's* and *Lampett's* cases, before mentioned.

But Executory interests may be released and bequeathed, and also assigned in equity.

But it is to be observed, that although Executory interests in chattels real cannot be in any way affected by the acts of the first legatee, they are capable of being *released* by the person decidedly entitled under the ulterior limitation, to the first taker, or other person in possession of the antecedent limited interest. (t) And they may also be transferred by deed to *strangers*, in *equity*; (u) but a Court of *law* does not recognise the assignment of such interests, before they vest in possession. (v) Executory interests in terms are also susceptible of *testamentary* alienation both at *law* and in *equity*; (w) and *that*, notwithstanding the testator

(r) See in regard to this distinction, *Dyer*, 253 b.; *Cro. Eliz.* 216; 1 *Rep.* 154; *Co. Litt.* 45 b.

(s) *F. C. R.* 422. And see *Wright v. Cartwright*, 1 *Burr.* 282.

(t) *Lampett's* case, *ubi supra*. *F.*

C. R. 423. 2 *Prest. Abst.* 118.

(u) 2 *Freem.* 250. 9 *Mod.* 101. 3 *P. Wms.* 132. 1 *Ves.* 409.

(v) 2 *Prest. Abst.* 118.

(w) *F. C. R.* 366, 548. 2 *Prest. Abst.* 118.

may not be ascertained as the person in whom the future interest may ultimately become vested, or notwithstanding he may be entitled thereto, otherwise than under the instrument by which the same was created. (x)

In regard to Executory bequests of chattels *personal*; the cases (y) which establish the freedom of such interests, from the claims of the *creditors* of the first taker, fully demonstrate their exemption from his power in any shape, whether it be in the nature of an assignment, sale, or other wrongful attempt at the extinction of the Executory interest. (z)

Executory interests in chattels personal equally free from extinction.

And the rule, that Executory bequests of chattels real and personal cannot be barred or destroyed, applies equally to every kind of such future limitations, whatever the nature or extent of the antecedent interest.

Rule of indestructibility applies to all kinds of Executory bequests.

This doctrine of the indestructibility of Executory interests by the act of any one, other than the person entitled under the future limitation, necessitates the application to them, of the same restrictive rule as that before referred to in regard to Executory devises of inheritance, namely, a rule, by which the creation of future interests shall be confined within such reasonable limits, as will avoid the inconvenience attending the existence of unbarrable rights of remote expectancy in any kind of property.

Necessity for restrictions upon creation of Executory bequests.

To establish a conclusion with respect to *Trusts* analogous to Springing and Shifting Uses and Executory devises and bequests, similar to that which has been arrived at in regard to those limitations themselves, can be matter of but little difficulty.

Equity is even more regardful than the Common law, of the preservation of future estates and interests from destruction by the owners of preceding interests; for it is a well-established rule of the Court of Chancery, that in the case of equitable life-estates and contingent remainders, the

Equitable future interests preserved from destruction equally with legal limitations.

(x) 1 Vict. c. 26, s. 2.

note. *Hoare v. Parker*, 2 T. R.

(y) *Cadogan v. Kennett*, Cowp.

376. *Vide supra*, p. 98.

432. *Foley v. Burnell*, Cowp. 436,

(z) F. C. R. 420, 421.

remainders are not liable to be defeated by the tortious alienation of the tenant of the particular-estate, nor by its determination before the happening of the contingency on which the remainder is suspended: the reverse of all which, is the rule of the common law. *A fortiori*, therefore, as to Trusts not limited after the manner of particular-estates and remainders, but creating substantive and independent interests (whether taking effect *in futuro*, or divesting previous gifts,) will equity prevent any destruction of future estates, by persons entitled under prior limited gifts. And this, the more, as there are no proper equitable assurances of the like forcible operation in Chancery, with common recoveries, fines, and feoffments, at Common law. These assurances are, indeed, when brought to bear upon equitable interests, similar to the Common law estates within the scope of their *ordinary* operation, attended by a like force and efficacy; as, *ex gr.*, a common recovery suffered by equitable tenant in tail; but as to their *extraordinary* and *tortious* effects, the nature of equitable rights is not congenial to their display. As to the point of the operation of a recovery suffered by a person having a Trust in fee, *æquitas sequitur legem*, is the rule; for as the *res gestæ* of the original question of the effect of a recovery at Common law, in a similar case, are of doubtful character (*i. e.* the operation of a recovery upon limitations engrafted on estates in fee, supposing it were allowed any, might either be considered proper and ordinary, or tortious and extraordinary,) the Chancery jurisdiction adopts the Common law rule. Equitable interests, therefore, similar to Future Uses and Executory devises and bequests, are equally exempt from liability to be barred or destroyed by the owners of antecedent estates.

Evils of remote estates as great in Chancery as at Common law.

This characteristic of Future Trusts established, the consequence must be the same with that which flows from a similar quality in Executory limitations at Common law. The evils of remote indestructible estates, as forming a clog upon the alienation of property, are as great when taking

the form of Trusts in Chancery, as when limited under the rules of the Common law; for as the equity jurisdiction is recognised, and concurrent with that of the Courts of law, resort to it would be an easy mode of evading the restrictions on the creation of remote estates, did it not impose an equally effective check upon that abuse of the right of property. But, further than this, the provisions of the law against too great remoteness in future unbarrable interests, are peculiarly in keeping with the salutary influence of the Court of Chancery in administering the laws of property, as all other justice; and such as it might have been expected to have adopted, as to estates and interests within its sole jurisdiction, even had not the like restrictions previously obtained in regard to limitations of legal estates. Limitations of Future Trusts are, therefore, subject to the same restrictions in equity, as are similar legal estates, at law.

And remedy
the same.

Thus much for the several kinds of limitations of future interests in property, legal and equitable, considered individually, as furnishing grounds for an antecedent probability of their being restricted to take effect within reasonable limits in point of time. In the prosecution of this Treatise, many instances of the several kinds of Executory interests, noticed in this and the preceding chapter, will promiscuously demand our attention, in a variety of views unconnected with their specific distinctions or relations; but what has been said in respect to those distinctions and relations, and their general distributive arrangement, will, it is apprehended, be sufficient to enable the reader, who may have occasion or feel inclination for it, to distinguish and classify the several limitations in question, as they occur.

General
remarks as to
the subjects
considered in
this chapter.

CHAPTER XL.

HISTORY AND PROGRESSIVE ESTABLISHMENT OF A RULE
FOR PREVENTION OF REMOTENESS, UNDER THE NAME OF
THE RULE AGAINST PERPETUITIES.

Notions as to remoteness in limitations at first vague ;

And practically uncertain and conflicting.

Remoteness of Executory devises and bequests.

Case of *Pells v. Brown*.

It has before been observed, that for a long time subsequent to the legal establishment of limitations by way of Springing and Shifting Use and Executory devise, there was no settled notion as to the ultimate period within which the law would confine the suspension of the possession and enjoyment of property, by means of those and similar limitations. Indeed, we find Lord *Nottingham*, in his time, laying down no more definite a rule on the subject, than that when *general inconvenience* begins, perpetuity must stop—a rule, one would think, requiring no very great legal discernment either to approve of or establish. The consequence was, that what was deemed a perpetuity, or a tendency to a perpetuity, at one time, escaped even the suspicion of being such, at another : that is, the limits of perpetuity were as vague and uncertain, as was the principle laid down for the guidance of the judges in fixing those limits.

But, to proceed in the inquiry concerning the progressive establishment of the legal boundaries of remoteness of Executory limitations, and :—First, as to limitations by way of *Executory devise and bequest*. The case which has generally been thought to have first given any thing like direction or shape to the laws of perpetuity, in relation to Executory devises, is, that of *Pells v. Brown* ; (a) which, it will be remem-

(a) Cro. Jac. 590 ; 1 Eq. Abr. 187, c. 4.

bered, (b) was the case of a devise to a younger son and his heirs for ever; and if he died without issue, living his elder brother, then to him and his heirs. The limitation to the elder brother was adjudged to be a good Executory devise; and the case, therefore, went so far as to establish the legality of an Executory devise to take effect within or at the expiration of a life in being. But still we cannot discover, from the arguments of the judges who differed from *Dodderidge, J.*, on the point of the destructibility of the Executory limitation, to what extent they were influenced in their decision, by the fact of the period, within which the limitation was to take effect, being no more than one life *in esse*. Indeed, from the report, it is not clear, that the question was even submitted to them, although it is reasonable to suppose, they must have considered it, as the dissentient judge assigned the danger of a perpetuity as the express ground of his opinion in favor of the destructibility of Executory devises. The case of *Pells v. Brown* occurred in the year 1621; and it is of this case that Lord *Kenyon* once said, "it was the foundation, and, as it were, the *magna charta* of this branch of our law."

Observations
upon *Pells v.*
Brown.

To the last-mentioned case succeeded that of *Snow v. Cutler*, (c) (between 1660-70) where there was a devise to the heirs of the body of the testator's wife, *if they should attain the age of fourteen*. The case is by no means satisfactory as an authority on the question under consideration, not only because the Court was divided in opinion, but also because the point of discussion appears to have been the validity of a double contingency; viz., the birth of a child, and the attainment by that child of the age of fourteen years; rather than, the validity of an Executory devise to take effect within a period of fourteen years superadded to a life in being. However, there was a clear recognition by

Case of *Snow*
v. Cutler.

These cases

(b) *Vide supra*, p. 81.

1 Keb. 752, 800, 151; 2 Keb. 11,

(c) 1 Lev. 135; T. Raym. 162; 145, 296; 1 Sid. 153.

allowed the period of one life in being to future limitations.

Several lives followed from the allowance of one life.

the judges in this case, that *Pells v. Brown* had settled the validity of an Executory devise to take effect within *one* life in being.

From the allowance of one life in being, the transition was easy, to two or more contemporary lives; because the period of any number of such lives, is, in fact, nothing more than the life of the person who may happen to be the survivor. This consideration,—that the lives are all wearing away at the same time, or, as it has been quaintly expressed, that “all the candles are burning at once,”—accounts for the fact of there not being any case to be found, in which the circumstance of the period of postponement including more than one life, has been urged as an objection against its validity. Directly executory limitations were allowed to take effect within the compass of a life in being, it seems to have been tacitly admitted, that two or more lives did not constitute too remote a period for the vesting of future estates.

Case of *Goring v. Bickerstaff*, establishing that conclusion as to terms of years.

Although no case is to be found in which the validity of an Executory devise of inheritance, after the determination of two or more lives, was actually decided, the legality of a limitation-over of the trust of a *term*, after *two co-existing lives*, was expressly affirmed by Lord Chancellor Clarendon, in the case of *Goring v. Bickerstaff*, (d) which occurred in or about the 14 Charles 2, (1664). In that case, it was resolved, “that the limitation of a term to several persons in remainder, one after another, if they be all in being and alive together, is good, and doth in no sort tend to the perpetuity of a chattel.” The principle of the decision was, obviously, applicable to an Executory devise of inheritance, although the subject of the devise, in the particular case under consideration, was a chattel. (e) Moreover, in the case, next in order of consideration, we do not find that any objection was taken to the validity of the Exe-

(d) Pollexf. 31; 1 Cha. Ca. 4; (e) 2 Harg. Jurid. Arg. 46.
2 Freem. 163.

cutory devise, on the ground that it could not take effect until after the determination of two lives in being. (*f*)

The case, alluded to, is that of *Taylor d. Smith v. Biddal*, (*g*) (adjudged in 1679) which, in effect, established the validity of an Executory devise, to take effect within the period of *a life in being and twenty-one years*. It was as follows:—A man having only one sister and heir, who had issue A., and afterwards married B., by whom she had issue C. and D., devised lands unto his sister, until C. should attain twenty-one, and after C. should have attained that age, to C. and his heirs, and if C. should die before twenty-one, then to the heirs of the body of B., and their heirs, *as they should attain their respective ages of twenty-one*; C. died before twenty-one, living B., and afterwards B. died: D. took the estate by way of Executory devise. Here, we perceive, that the heir of the body of B., could not take until after the death of B., (as, *nemo est hæres viventis*,) and since that heir of the body of B., who should attain twenty-one, might not have been born in his father's lifetime, and the estate was not to vest in him till he attained twenty-one, the property might, possibly, not have vested under the limitations, till twenty-one years after the period of a life in being. (*h*)

Case of *Taylor v. Biddal*.

Seemed to sanction the period of lives in being, and twenty-one years.

This case, however, was by no means considered, by the lawyers of the time, as having clearly prolonged the period of perpetuity to a life or lives in being and twenty-one years. For, in one case, (*i*) which occurred in 9 Wm. 3, it was contended, that the contingency, on which an Executory devise should take effect, could not be extended beyond a life in being, and two judges uttered different *dicta*, both falling short of the decision in *Taylor v. Biddal*:

But not so treated.

(*f*) The same observation applies to the case of *Lloyd v. Carew*, stated *infra*, p. 151, and decided in 1696; but which, as relating to a limitation by way of Shifting Use, is not more particularly noticed in this place.

(*g*) 2 Mod. 289; Freem. 243; 1 Eq. Abr. 188, c. 11.

(*h*) F. C. R. 432.

(*i*) *Loddington v. Kime*, 1 Raym. 203.

in another, (k) 12 Wm. 3, the judges considered lives in being as the *ne plus ultra* of remoteness of Executory devise; and in a third, (l) (1722), great doubt was expressed whether the addition of twenty-one years to lives in being should be allowed.

Duke of Norfolk's case.

The next case which occurred, although only going to the extent of a life in being, was far more satisfactory as a decision on the period of perpetuity, than any which had previously occurred, and may, perhaps, be regarded as the first, in which any intelligible or definite notion existed as to the nature of a perpetuity, or in which the question of remoteness of contingency of Executory devise, was at all satisfactorily discussed. The case, in question, was the famous one, known by the name of the duke of Norfolk's case, (m) and which, from its important bearing upon the subject before us, has been sometimes called the *case of perpetuities*. It was, in substance, this:—Henry Frederick, earl of Arundel, had issue, Thomas, his eldest son, Henry, Charles, Edward, Francis, and Bernard, and a daughter, Catherine. Thomas, the eldest son, was *non compos mentis*. By indenture, dated the 4th day of March, 1647, and made between the earl, of the one part, and the duke of Richmond, and others, of the other part, the baronies of G. and B. were conveyed to the use of the earl for life, with remainder to trustees for two-hundred years, with remainder to Henry, the second son, and the heirs male of his body, with remainder to Charles, in tail male, with remainder to Edward, in tail male, with remainder, in like manner, to the other sons, with remainder to the right heirs of the earl. By another deed, the trusts of the term of two-hundred years were declared to be, to attend the

(k) *Scattergood v. Edge*, 12 Mod. 277.

(l) *Gore v. Gore*, 2 W. Kel. 204; 2 P. Wms. 28; 2 Stra. 948.

(m) 3 Cha. Ca. 1; 2 Cha. Rep.

229; 2 Freem. 72, and 80; Pollexf. 223. And see also *Massenburg v. Ash*, 1 Vern. 234. *Maddox v. Staines*, Ca. T. T. 228.

inheritance: the profits to be received by Henry, the second son, and the heirs male of his body, and, in default of such issue, by such other persons as, according to the limitations of the Uses, would have been entitled to them, in case no such term had been created, so long as Thomas, the eldest son, or any issue male of his body, should live: but in case Thomas should die, without issue male, in the lifetime of Henry, the defendant in the cause, or if after his death, the dignity of earl of Arundel should descend upon Henry, then Henry, or his issue, should have no further benefit of the term of two-hundred years, but the benefit of it should accrue to the plaintiff, Charles, and the heirs male of his body, with like limitation-over to the rest in succession. Thomas, the eldest son, died, without issue male; and the earldom of Arundel and dukedom of Norfolk descended upon Henry. The duke, having become tenant in tail, subject to the term of two-hundred years, his brother Charles claimed the trust of the term. A question arose, whether the trust of the term, under which Charles claimed, was too remote, after the trust for Henry and the heirs male of his body. Lord *Nottingham* called in to his assistance, the Chief Justices, *Pemberton* and *North*, and the Chief Baron, *Montagu*. The three Chiefs unanimously considered the trust for Charles, in the event of the death of Thomas, without issue male, in the lifetime of Henry, void: but the Lord Chancellor, in a distinguished and eloquent argument, decided it to be good: which decree was afterwards affirmed by the House of Lords. The ground of the decision was, that the trust for Charles was to take effect during Henry's life, and did not, therefore, tend to a perpetuity. Mr. *Hargrave* observes, (n) in reference to this case, that it was thought to be within the principle of the decree, that so long as the settlement of any species of property by Executory devise, or by Trusts

Observations
upon the duke
of Norfolk's
case.

(n) 2 Jurid. Arg. 50.

of the same nature, did not exceed the ordinary time for barring a regular entail by estates for life, with remainder in tail to an unborn child; which was, when such child should attain twenty-one; it would be considered as allowable. That gentleman also observes, that this led to a general practice of settling terms for years, and of providing portions for children, under the trusts of such terms, to the extent of lives in being and twenty-one years after: and that such practice was made a chief ground of extending Executory devises of inheritance, in like manner; an extension which was affected by the case next to be noticed.

The case of
Stephens v.
Stephens.

The case referred to, was that of *Stephens v. Stephens*, (o) in the year 1736; the facts of which were:—A testator devised lands to his grandson W. and his heirs, and if he should die under age, then to his grandson, T., and if T. should die under age, then to *such son of the body* of his daughter M. S., by his son-in-law, T. S., *as should happen to attain his age of twenty-one years*, with remainder-over. The testator died, leaving his grandsons, W. and T., who both died under age: afterwards, T. S. had another son by M. S., named A. A. claimed the lands under the limitations in the will. T. S. also claimed, as residuary devisee; and M. S., as heir-at-law of the testator. The judges, after observing that the principal point was, whether the devise-over, upon T.'s dying under twenty-one years, to such other sons of M. S. as should attain twenty-one years, was good by way of Executory devise, said, that they were unable to find any other case, wherein the Executory devise of a freehold had been held good, where the vesting of the estate was suspended until a son, unborn, should attain twenty-one, except the before mentioned case of *Taylor v. Biddal*. Therefore, they said, that however

(o) Ca. T. T. 228. Forrest.
228. And see also *Goodtitle v. Wood*,
Willes, 211; 7 T. R. 103, note;
Sheffield v. Lord Orrery, 3 Atk. 282;

Gulliver v. Wicket, 1 Wils. 185; *Bullock v. Stones*, 2 Ves. sr., 521; *Goodman v. Goodright*, 2 Burr. 873.

unwilling they might be to extend Executory devises, beyond the rules generally laid down by their predecessors, yet, upon the authority of that judgment, and its conformity to several late determinations in cases of terms for years, and considering that the power of alienation would not be restrained longer than the Common law would restrain it, viz., during the infancy of the first taker, which could not be reasonably said to extend to a perpetuity, they were of opinion, that the limitation in question was good by way of Executory devise. Since this adjudication, it has always been allowed, that Executory devises of inheritance, to take effect within the period of a life or lives in being, and twenty-one years after, are valid: but still, it was by no means clear, from the decision, that that period was to be considered the *ultimum quod sit* of remoteness.

The decision in *Stephens v. Stephens* established the period of lives in being and twenty-one years.

The statute of 10 & 11 Gul. 3, c. 16, having provided that children *en ventre sa mère*, born after their father's death, should, for all purposes of limitations of estates, be deemed to have been born in his lifetime, the rule as to the period of remoteness laid down in *Stephens v. Stephens*, obtained a further extension, by mere operation of law, of some nine or ten months, as the period of *gestation*. For example, let us suppose, that in the same case of *Stephens v. Stephens*, T. S. had died, leaving his wife *enceinte*, and the child, A., had not been born for some months after the decease of T. S.; in that case, the Executory devise under which A. eventually became entitled, would not have taken effect until the lapse of twenty-one years and a few months, beyond lives in being, and yet such Executory devise would, unquestionably, have been good. The case of *Stephens v. Stephens*, must, therefore, be considered as having established the validity of Executory devises to take effect within the period of a life or lives in being, and twenty-one years and nine or ten months afterwards.

This extended for the period of gestation, by effect of 10 & 11 Gul. 3, c. 16.

The next step in the progress of the rule, fixing the time for which the possession and enjoyment of real estate may

Case of *Long v. Blackall*, which allowed

a double period
of gestation.

be suspended, was the allowance of a period of gestation at the *commencement* of the contingency, as well as at an intermediate part of it. This extension of the rule was effected by the Court of B. R., in the case of *Long v. Blackall*, (*p*) during the time of Lord *Kenyon's* presidency in that Court. A testator bequeathed a lease for years to trustees, in trust for his son, T. B., for life, and after his decease, in trust for such issue male of him, or descendants of his issue male, as at the time of his death should be his heir, and if at the time of T. B.'s death, there should be no such issue male, or descendants of issue male of him, living, then, in trust for the testator's son, S. S. B., for life, and after his decease, in trust for such issue male of him, or descendants of his issue male, as at his death should be his heir, and if at the time of his death, there should be no such issue male, or descendants of issue male of him, living, then, in trust for the child, with which the testator's wife was then *enceinte*, if the child should be a son, during his life, and after his decease, in trust for such issue male, or descendants of his issue male, as at the time of his death should be his heir, and if at the time of the death of such child, there should be no such issue male, or descendants of such issue male of him, living, or if such child in the womb should not be a son, then, in trust for such persons as should then be the testator's legal representatives. The child in the womb was born after the testator's decease, and was a son. The two sons living at the date of the will, and also the posthumous one, died without leaving issue. One of the questions which arose, was, whether the limitation—over to the testator's legal representatives, was good. On a case from Chancery, the Court of B. R. sent their certificate in favor of the ultimate limitation, as a good Executory devise. The case itself, it will be perceived, was not one, in which a double period of gestation was actually allowed: but as the *life of a posthumous child* was one of those, on which

the ultimate limitation, whose validity was in question, depended, the point for decision was, the propriety of *beginning* the period of contingency on which the Executory devise was to take effect, with the life of a person in the womb. This case has been, since, generally deemed (*q*) an authority for the allowance of two periods of gestation to Executory devise, besides lives in being and twenty-one years: although attempts have been made (*r*) to show, that it was nothing more than a decision affirming the allowance of a legal time for the birth of *one* posthumous child; and that the judges did not contemplate the particular circumstance of the time of the birth of the posthumous child being taken at the commencement of the period of contingency; because, in the case under their consideration, it was of little moment, the allowance of another period of gestation not being required.

Our attention has, thus far, been confined to decisions on cases of Executory devise and bequest; but before proceeding further with the inquiry, it will be proper to take a short review of a few cases of limitations, by way of *Springing and Shifting Use*.

Remoteness
of *Springing*
and *Shifting*
Uses.

As in the case of Executory devises, so here, we shall be able to discover no definite rule abided by, in the earlier decisions upon the subject. We meet with the same dread of "perpetuity:" but what constituted a perpetuity, and what, or, indeed, whether any, principle guided the consideration of the question, it is difficult to ascertain. *Holt*, C. J., laid it down, (*s*) that if one bargain and sell to the use of another, five years hence, this was a good Future or Springing Use. And it is also said, by the same authority, that a feoffment to the use of the right heirs of J. S., after the death of J. S., if he die without issue within twenty years, was a good commencement of a Future Use. Indeed,

Originally,
views of
remoteness as
to limitations of
Uses, equally
undefined with
those respect-
ing Executory
devises.

(*q*) 6 Cru. Dig. 488.

(*s*) In *Davies v. Speed*, 12 Mod.

(*r*) 2 Hargr. Jurid. Arg. 105, et 39; 2 Salk. 675; Holt. 731.

Lord Chief Justice *Hale* had before (*t*) treated it as clear, that the limitation of a Use, after two years, or after the death of John at Stiles, to the use of J. N., was good. Lord *Bacon*, also, considered (*u*) a bargain and sale to J. S., to take effect after the bargainor's death, without issue, as a valid expectant Use ; but, at the present day, such a limitation would clearly be bad, as tending to a perpetuity. So, again, it was said, (*v*) if a man covenant to stand seised to the use of his mother in fee, if he himself die without issue, the use should arise ; for the contingency happens, if at all, upon the covenantor's death. In addition to these, there are many other *dicta* to be found in the earlier text-books, so vague and unsatisfactory, as to make it impossible to extract from them, any thing like a definite idea, as to whether any and what restriction was imposed on the creation of future Uses. Probably, however, it is not risking too much to say, that there appears to have been little doubt entertained, that the limitation of a Future Use to arise within the period of a life in being, was allowable.

Bostock's case.

The first authority deserving notice is *Bostock's case*, (*w*) which was as follows :—W. B., father of E. B., grandfather of R., being seised in fee of a messuage and mill, and other hereditaments in B., and M., and also of another messuage with a curtilage in B., levied a fine of the said hereditaments, as to the estate in B. and M., (except a close called G. C.,) to the use of W. B. for life, and, after his decease, to the use of E. B. and the heirs male of his body, on the body of M., his wife, together with other remainders-over in tail, with remainder to the right heirs of E. ; and as to the other messuage and certain lands thereto belonging, and the said close called G. C., before excepted, to the use of E. B., for life, remainder to the use of the heirs male of the said E. B., on the body of the said M., together with other remainders in tail, remainder-over in fee to the right heirs of E. B. ; and if the

(*t*) Pollexf. 65, 66.

(*v*) Pollexf. 530.

(*u*) Read. Uses, 63.

(*w*) Ley, 56.

said E. B. should fortune to die (living the said M.) that then the said fine should be of the said last mentioned messuage and the lands thereunto belonging, and therewith occupied, and of the said close called G. C., to the use of the said M., for the term of her life, and after her decease, to the uses aforesaid. E. B. died, living M. and W. B. the grandfather; and it was resolved, that the estate M. was entitled to, was an estate for life in the last-mentioned messuage. This, we may observe, was a clear adjudication of the validity of a *Shifting* Use, to take effect within the compass of a life in being.

The next case to be noticed, is that of *Roe v. Tranmer*, (x) Case of *Roe v. Tranmer*. where T. K., being seised in fee of the lands in question, executed indentures of lease and release of them to his brother. By the release, T. K., in consideration of natural love, and of 100*l.*, granted, released, and confirmed to his brother, after the death of the said T. K., all that close, &c., to hold the same to his said brother, and the heirs of his body. It was admitted that the conveyance was void as a release, being a grant of a freehold to commence *in futuro*: but the Court held, that it should operate as a covenant to stand seised to uses; and that the estate should vest in the brother as a *Springing* Use. This decision may be regarded as establishing the validity of a *Springing* Use, limited to operate on the expiration of a life in being.

The next case bearing upon the question of the remoteness of the contingency upon which a *Springing* or *Shifting* Use may be limited, is that of *Lloyd v. Carew*. (y) Case of *Lloyd v. Carew*. M. and P. T., being seised in fee as coheirs, in consideration of 4000*l.* paid to M. by R. C., and of a marriage which soon afterwards took place, between P. and R. C., conveyed all their estates to trustees and their heirs, to the use of R. C. for life, remainder to P. for life, for her jointure, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of R. C. and P., in tail male, suc-

(x) 2 Wils. 75.

(y) Show. Parl. Ca. 137. Pro. Cha. 72.

cessively, remainder to the daughters in tail, with the ultimate remainder to the said R. C., and his heirs for ever; subject to a proviso, that if it should happen, that no issue of the said R. C. by the said P. should be living at the decease of the survivor of them, and the heirs of the said P. should within twelve months after the decease of the survivor of the said R. C. and P., dying without issue as aforesaid, pay to the heirs or assigns of the said R. C. 4000*l.*, that then the remainder in fee-simple so limited to the said R. C. and his heirs should cease, and that then and from thenceforth, the premises should remain to the use of the right heirs of the said P. for ever. Here, it will be observed, the contingency extended to two lives in being, and one year beyond. A bill in Chancery was filed by the wife's coheirs, against the husband's heir, to have the benefit of the limitation, on payment of the 4000*l.* The Court, assisted by two judges, dismissed the bill; and, as it should seem, because the contingency was too remote. (z) But the plaintiff appealed to Dom. Proc. Before that tribunal, the great point was, whether one year beyond lives in being, was not an excess of the time for an Executory devise of the fee, or for a contingent limitation or Springing Use of the same nature; it being contended for the respondent, that the lives of persons *in esse* constituted the *ne plus ultra* of Executory devise and Springing Use. The case ended in a reversal of the decree, and, consequently, became an authority for one year beyond lives in being, as not too remote a contingency on which to limit a Springing or Shifting Use.

Observations upon the nature and effect of the decision in this case.

It is difficult to say, upon what principle the excess of one year beyond lives in being was allowed in the last-mentioned case; or what further period of remoteness is to be considered as having been legalized by the allowance of an arbitrary term of one year, unconnected with the situation or circumstances of the party to whom the ulterior Shifting Use was limited. Certain it is, that there is no reason for the allowance of one year beyond lives in being, which is

(z) 2 Harg. Jurid. Arg. 36.

not equally applicable to any other arbitrary number of years, added to a life or lives; unless it be that of convenience. And it is to this latter only, that we must look for the meaning and extent of the decision in *Lloyd v. Carew*: for the judges, in the case of *Cadell v. Palmer*, hereafter cited, (a) although their opinions were in favor of a gross term of twenty-one years beyond lives in being, took especial care to remark, that although the case of *Lloyd v. Carew* established that the period of a life or lives in being was not the *ultimatum* of perpetuity, yet it does not authorize the inference, that a term of twenty-one years or other arbitrary term, for which no special or reasonable purpose is assigned, would also be allowed.

From the extreme paucity of cases in which the question of remoteness, in reference to the creation of Springing and Shifting Uses, has obtained any discussion, we shall find it impossible to take a progressive view of the doctrine of perpetuity, as exclusively applicable to limitations by way of Use, similar to what has been done on the subject of Executory devises. The writer has been unable to discover any decisions relating to Springing and Shifting Uses, corresponding to the before-mentioned cases of *Taylor v. Biddal*, *Stephens v. Stephens*, and *Long v. Blackall*, by which the law of perpetuity, as applicable to Executory devises, was so materially assisted. Nor does this hiatus in our historical deduction, occasion a deficiency of any great importance, except, perhaps, as regards the completeness of a continuous chain of decisions, and progressive development of principles, gradually approximating to the rule and doctrine of law ultimately established. For every practical purpose, as has been before remarked, there is a reciprocal applicability of all rules laid down on questions of remoteness of contingency, between Springing and Shifting Uses and Executory devises; and whatever the state of the law on

Rarity of authorities upon remoteness of limitations by way of Use.

This deficiency of little practical importance; rule as to Executory devises being applicable to future Uses.

(a) *Vide infra*, p. 159. And see of Pow. Dev., vol. 2, pp. 397, 398. remarks of Mr. Jarman, in his edition

the subject at any given period, no doubt appears to have been ever entertained, that what was too remote a contingency for an Executory devise, was liable to the same objection in regard to limitations by way of Use, *et à converso*. (b) In addition to this, it is to be observed that Lord *Rosslyn*, in the case of *Blandford v. Thackerell*, (c) (which occurred in the year 1793,) remarked, that there might be any number of Springing Uses within twenty-one years, after lives in being, which was the precise period of remoteness established in regard to Executory devises, by the case of *Stephens v. Stephens*, in the year 1736.

The question, whether the term of twenty-one years was absolute, or conditional on infancy.

Thus far, therefore, we have seen, that Springing and Shifting Uses and Executory devises may be limited to take effect on events or contingencies to happen within the space of a life or any number of lives in being, and twenty-one years after; together with two periods of gestation, one at the commencement, and the other at an intermediate part, of the period of postponement. Doubt and uncertainty, however, were not yet put an end to: the exact limits of the rule had yet to be clearly ascertained. A question arose, on the construction of the rule, as just stated, of the following nature:—On the one hand, it was contended, that the term of twenty-one years superadded to lives in being, within which a Springing or Shifting Use or Executory devise might be limited to arise, was intended to be a *gross* term, irrespective of the state or circumstances either of the person whose estate was to be divested, or of the person entitled under the ulterior limitation. On the other hand, it was said, that these additional years must coincide with the non-age either of the person whose estate was to be divested, or of the person in whom the estate, under the Shifting Use or Executory devise, is to vest. In order to comprehend this question, it must be observed, that the

(b) See *Curwardine v. Curwardine*, edit., 94, note, and 111, note. F. C. R. 388; 1 Eden, 34. And (c) 2 Vea. jr. 241, 242. see *Powell's* note to F. Ex. Dev. 4th

period of lives in being and twenty-one years was a limitation of time, not *arbitrarily* selected by our Courts of justice, but adopted in analogy to the case of the ordinary limitations in a settlement, under which freeholds of inheritance could not be so limited by way of remainder, as to postpone a complete bar of the entail, by fine or recovery, for a longer space. (d) For instance, in the case of a settlement in favor of the husband for life, with remainder to the wife for life, with remainder to trustees to preserve contingent remainders, with remainder to the eldest son in tail, remainders-over; the husband may die leaving his wife *enccinte*, and a son be afterwards born: in such a case, as the law restrains the exercise of any act of ownership over the inheritance till the infant son attains twenty-one, the power of alienation becomes, in that event, suspended for two lives and twenty-one years; and as the law imposes such suspension of the power of alienation on the infant, so it will permit a similar suspense by the owner for a like period. This was not denied to be the reason of the period fixed by the rule under consideration, for the vesting of Future Uses and Executory devises, by the supporters of either of the views in question, but the controversy was, as to the extent of its application.

The first case which called for the consideration of this question, was that of *Beard v. Westcott*, (e) the facts of which, as far as they are material to our present purpose, were as follow:—A testator, being seised of three different estates, gave one estate unto his grandson J. J. B., and his assigns, so that he and they might receive the rents thereof during the term of ninety-nine years, if he should so long live, and immediately after his decease, then he gave the same to the first son of the body (then unborn) of J. J. B., lawfully to be begotten, and his assigns, he and they to receive and take the yearly rents thereof for the like term of

Case of *Beard*
v. *Westcott*.

(d) Harg. note to Co. Litt. 20 a, Ex. Dev. 4th edit. 113, note.
note 5. And see *Powell's* note to F. (e) 5 Taunt. 393.

ninety-nine years, if he should so long live, and, so on, in tail-male to the issue of such first son lawfully issuing, for ever, and for want and in default of such issue of such first son, then to the second, &c., sons, of the grandson, in like manner; "and in case there shall be no such issue male of the same J. J. B., nor issue of such issue male, at the time of his death, or in case there shall be such issue male at that time, and they shall all die before they shall respectively attain their respective ages of twenty-one years, without leaving lawful issue male;" then, there were similar limitations to the testator's grandson J. B., and his sons, and their issue male, with remainders-over. The testator then gave another estate to J. B., and his sons, and their issue male, in like manner, as he had before given the first estate to J. J. B., and his sons, and their issue male, with remainders-over. The remaining estate the testator devised to his granddaughters, E. B. and M. B., and their sons, and their issue male, in the same manner, with remainders-over. The judges determined, that the limitation to J. J. B. and his first son, were valid, but that the remainder to the issue male of J. J. B.'s first son, were bad, as being too remote, and that the limitations to the second and every other son, and their issue male, were also bad, as being limited to take effect generally after the determination of estates bad in their creation. They, further, decided, however, that the gift-over, "in the event of there being no son of the said J. J. B., nor issue male of such son, living at his death, or there being such issue male at that time, in the event of all of them dying before they attained twenty-one, without leaving lawful issue," was good, on the ground, (it should seem) that it must take effect, if at all, within the period of a life in being, and twenty-one years after; although the twenty-one years were not measured by the minority of the devisee intended to take under the limitation, but by the minority of a prior devisee, *the devise to whom was inoperative*, as tending to a perpetuity. In this case, we may observe, that

had the limitation to the issue male of the sons of the grandson, J. J. B., been valid, the additional period of twenty-one years would have been coincident with the infancy of the person whose estate was to be divested, and the decision would not have amounted to an authority for a gross term of twenty-one years beyond lives in being. As it was, however, the devise to the party, whose estate was intended to be divested by the ulterior limitation, was inoperative, as tending to a perpetuity, and, therefore, the additional years (which had reference to his minority) constituted, in reality, a gross term, unconnected with the devisee, in whom the estate was to vest under the Executory devise, and necessarily (because of the variance between the legal operation of the limitations and the testator's intention) independent of the infancy of the prior devisee. But, on account of the *intended* coincidence of the additional years with the minority of the devisee, whose estate was to be divested, the decision (albeit, made after full discussion) was not deemed conclusive on the question under consideration, as it would have been, had the *will itself* created a gross term of twenty-one years. Before the lapse of many years, consequently, another opportunity was found for a more complete and satisfactory adjudication upon the point at issue.

This was afforded by the case of *Bengough v. Edridge*, (f) which was decided by the late Sir John Leach, V. C., so recently as the year 1827. The question arose on the will of Mr. Henry Bengough, of Bristol, who devised to certain trustees, all his real estates, in trust to accumulate the rents for twenty-one years, and with the accumulations to purchase other real estate, which was to be held upon the trusts declared by his will. Subject to the trusts for accumulation, the trustees were to stand possessed of all the devised estates for the term of one-hundred-and-twenty years, to commence from the testator's death, if twenty-

Case of
Bengough v.
Edridge.

(f) 1 Sim. 173—271.

is not to take effect until after the determination of one or more life or lives in being, and upon the expiration of twenty-one years afterwards, as a *term in gross*, and without reference to the infancy of any person who is to take under such limitations, or of any other person." Secondly, "Whether a limitation by way of Executory devise, is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the ordinary period of gestation; but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any persons whatever, born, or *en ventre sa mère*." The third question was merely a variation of the second, by substituting for the words, "number of months equal to the ordinary period of gestation," the words, "the number of months equal to the *longest period of gestation*." In answer to the first of these queries, *Bayley, B.*, (after entering into a very elaborate examination of the decided cases and *dicta* bearing upon the subject,) delivered the unanimous opinion of the judges, to the effect, that limitations by way of Executory devise, were not void, if limited to take effect within the period of a life or lives in being, and twenty-one years, *without reference to the infancy of any person whatever*. To the second and third questions, the judges replied, that they considered lives in being and twenty-one years as the limit of the rule, and *that the period of gestation was to be allowed in those cases only in which gestation exists*. In conformity with the opinions of the judges, the case ended in an affirmance of the decree of the Court below; and, thus, was finally settled, in the affirmative, the question, whether the superadded term of years might be absolute, or, in other words, be used irrespectively of the infancy of persons taking under the limitations.

Settled, that the term of twenty-one years may be absolute.

But additional months coincident only with gestation.

It will be observed, that the two latter questions had no peculiar connection with the case then under consideration,

but were submitted by the House to the judges, as has been properly said, (j) "with a laudable anxiety to close the door to all future discussion" upon the subject.

But the decision in the case of *Cadell v. Palmer*, it must be noticed, did not merely establish the legality of Executory limitations to take effect on the determination of lives in being, and the expiration of a gross term of twenty-one years afterwards; for it also tacitly sanctioned the use of lives, *otherwise entirely unconnected with the limitations*, for the purpose of prolonging the period of postponement. The twenty-eight lives named in Mr. *Bengough's* will, were not the lives of persons who were, each individually, to take interests in the devised property, and for the sake of whom, the vesting of the future estates in strict settlement, was postponed: they were lives arbitrarily selected, to furnish a portion of the period during which the possession and enjoyment of the inheritance might be suspended. This arbitrary adoption of lives, unconnected in point of interest with the limitations of the will, was urged as one of the objections against the validity of the testator's dispositions, by the counsel for the appellant; and its propriety, therefore, (although no reference was made to the point, in the few observations of the Lord Chancellor, on moving the affirmance of the decree, nor any question submitted to the judges in reference to it,) must be taken to be settled. (k)

Thus have we traced the gradual progress of the rule of law, on the subject of remoteness of future Executory limitations, from the reign of James I, in which the case of *Pells v. Brown* occurred, down to the year 1833, when the case of *Cadell v. Palmer* was decided. We have seen the limits of the rule now extended, and now con-

The lives forming part of the period of suspension may be those of persons not beneficially interested.

General remarks as to subject of this chapter.

(j) 1 Jarm. Wills. 222.

(k) The real property Commissioners seem to consider this as one of the consequences of the decision by

the V. C. in the same case, when before him, as *Bengough v. Edridge*. See their third Report, pp. 37, 38, 39.

tracted, according to the judges' notions of—*convenience*, (Lord *Nottingham's* unerring pole-star for the guidance of the judicial mind!); at one time, they have received extension by mere operation of law; at another, they have oscillated uncertainly, between conflicting constructions of the very terms in which they have been defined: until, at length, and by imperceptible degrees, two centuries of doubt and argumentation have enabled judicial wisdom, (unaided by Legislative interposition,) to frame and complete that important article in our jurisprudential code, known by the name of the *Rule against Perpetuities*. (1)

(1) Throughout the body of this work, the *Rule*, rather than, the *Rules*, against Perpetuities, is spoken of, as well, for greater conveniency of reference, as, because mention is made of the prohibitory law, more frequently

in its character of a provision fixing a definite period of time, than as a system serving an important end of public policy. In this enlarged sense, the law was considered in the introductory remarks.

CHAPTER XII.

DEFINITION OF A PERPETUITY.

A fitting opportunity seems to offer, for supplying a formal definition of that species of remoteness of limitation, to which the law affixes the denomination of *a perpetuity*. At the same time, however, it must be admitted, that while legal lexicography supplies few words less susceptible of full and adequate definition, few have been the subjects of more frequent and more varied attempts at description.

Sometimes, a perpetuity has been declared (m) to be, "an estate unalienable, though all mankind join in the conveyance," and, in supposed accordance with this view, every Executory devise was said to be "a perpetuity as far as it goes." At another time, it was said, (n) "a perpetuity is, when if all that have interest join, yet they cannot bar or pass the estate." Of declamatory representations of perpetuity, also, there has never been much lack; *e. g.* (o) "a perpetuity is a thing, odious in law, and destructive to the commonwealth; it would stop the commerce, and prevent the circulation of the property of the kingdom."

Modern writers have sometimes attempted to define a perpetuity, with reference rather to the rule of law, as it respects the *period* of remoteness, than to any inherent quality of the thing itself. (p) Thus, (q)—"we may now define a perpetuity to be, a limitation, tending to take the subject out of commerce, for a longer period than a life or lives in being, and twenty-one years beyond, and, in the

Perpetuity,
not easy of
definition.

Notice of some
definitions that
have been
given of it.

(m) In *Scattergood v. Edge*, 1 Salk. 229.

(n) In *Washbourne v. Donnes*, 1 Cha. Ca. 23.

(o) Vern. 164.

(p) 2 P. Wms. 688.

(q) Rand. Perp. 48.

case of a posthumous child, a few months more, allowing for the term of gestation."

This mode of definition, however, is, obviously, imperfect, and open to objection, as it is not applicable to any other state of the law than the present, with respect to the period of remoteness; and does not, therefore, suffice for a description of perpetuity, during those times when a period, less than lives in being and twenty-one years, was the *ne plus ultra* of remoteness.

Mr. Sanders' description of perpetuity.

The best and most comprehensive definition, seems to be that supplied by Mr. *Sanders*, in his *Essay on Uses and Trusts*, (r) who says,—“ a perpetuity may be defined to be, a future limitation, restraining the owner of the estate from aliening the fee-simple of the property, discharged of such future Use or estate, before the event is determined, or the period is arrived, when such future Use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity.”

A definition of perpetuity.

In other words, a perpetuity is, a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation.

The writer cannot forbear introducing in this place, the following happy observation by the author of the *Treatise on Wills*, which, though not strictly germane to the subject of the definition of perpetuity, certainly lays bare the frequent *motives* to its creation. “ *Te teneam moriens*, is the dying lord's apostrophe to his manor, for which he is forging these fetters, that seem, by restricting the dominion of others, to extend his own.”

CHAPTER XIII.

BASIS AND GENERAL ANALOGY OF THE RULE AGAINST
PERPETUITIES.

It is generally said, that the limit of time prescribed by the Rule against Perpetuities for the vesting of future estates and interests, has been fixed by analogy to the period, for which the law allows the suspension of the full enjoyment of property, in the case of ordinary settlements by way of particular-estates and remainders.

Supposed
analogy of
Perpetuity-
rule to
settlements by
way of particu-
lar-estates and
remainders.

To some extent, the observance of this analogy may certainly be traced, in the later decisions upon the extreme boundary of remoteness of Executory limitations, although the uncertainty attending the rules of law on this point, prior to the decision in *Stephens v. Stephens*, (1736) forbids our supposing that the older judges had any definite or settled rule, for guiding their determinations on questions of remoteness.

It will be observed, that the period during which the power over the inheritance, or absolute interest, of property, may be suspended, in the case of the ordinary limitations in strict settlement, is, the life of the tenant for life, (generally the father) and the whole duration of the minority of the tenant in-tail, who may possibly not be born until after the decease of his father; in which case, it is manifest, twenty-one years must elapse, before the law endues him with the capacity of exercising the powers of alienation belonging to his estate. In regard, therefore, to the *possible* length of

time, for which the acquisition of full power over the property may be postponed, there is, obviously, so far, an analogy, between ordinary settlements, and limitations by way of Executory devise, and Springing and Shifting Use ; as that length of time extends to the extreme period of remoteness allowed by the rule of law. (*s*)

(*s*) "In fixing the boundary beyond which executory limitations should not be permitted to operate, the Courts proceeded by way of analogy to the legal effect of remainders at Common law. in postponing the exercise of powers of alienation. The usual effect of such a settlement was, to limit the lands to a person during his life, with an immediate remainder to his children, or some of them, in tail. In all such cases, the tenant for life was in existence when the settlement began to operate ; and it has been stated, that the law did not allow such limitations of it as conferred a life-estate on his children, with remainder in tail to their children. Thus, the utmost restraint upon alienation which the law, as it stood after the Statute *De donis*, allowed in a settlement of real property, was, the limitation of one or more life-estates to persons in being, and a limitation of one or more estates-tail in remainder expectant on the expiration of the preceding estate or estates for life. A power of alienation by fine or recovery was inseparably inherent in the seisin of an estate-tail, but the exercise of it was necessarily suspended during the minority of a tenant in tail. Supposing, therefore, an estate to be limited, in the usual manner, to the father, remainder to his sons successively in tail, and that the father died, leaving an only son just born, or his wife *en ventre*, the land would be inalienable during the life of the tenant for life, and after his

decease, would remain inalienable during the term of twenty-one years, (the term of the son's minority) with a possible protraction of that term for a few months, to allow for the period of gestation. This was the utmost period to which the restraint on alienation could be protracted. In reference to this obvious case, and without perplexing the general law on the subject by a further attempt at analogy, the Courts, by a long series of determinations, fixed the actual boundary of Executory limitations at an event so limited, that it must, from its nature, either take effect, or become incapable of taking effect, within the period of one or more life or lives in being, and for the term of twenty-one years, with an allowance of a few months, or at the immediate expiration of that period. Thus, the general system of the modification of property, is, that both real and personal estate may be so far fixed in settlement, as to be confined in a particular course of devolution, and rendered absolutely inalienable, during one life, or any given number of lives, in being at the same time, and a further period of twenty-one years and a few months ; but that at the end of this period, the property again becomes open to alienation, with this difference, that at the end of the period, the real estate must either vest in some person for an absolute estate in fee-simple, which includes a general power of alienation, or must vest in some person for an estate-tail : in such latter case, by a

But the analogy fails in two very important points. *First*, —in the case of ordinary settlements, by way of particular-estate and remainder, the lives which form a portion of the period, during which the complete enjoyment of the property is postponed, are those of persons taking interests in it, and, therefore, enter into and substantiate the reasons or grounds of that postponement. In regard, however, to the period fixed by the Rule against Perpetuities, the connexion of the lives named with interests created in the property, is of no importance, as they may be those of persons, or classes of persons, in no way benefited by the prior gifts. As, for example, it is perfectly consistent with the terms of the Rule against Perpetuities, to make the lives of all the present members of the House of Lords, or, of all her Majesty's present soldiers, a part of the period of suspension; the aggregate number of lives being regarded as, in fact, nothing more than a period equivalent to the duration of the life of such one of the persons named, as shall survive all the others. The case of *Bengough v. Edridge* affords an instance of this arbitrary selection of a number of lives, for the mere purpose of increasing the period of postponement. That such exercises of the power of settlement allowed by the English law are flagrant abuses of the spirit of the Rule against Perpetuities, and were in no way contemplated in the original fixation of its limits, is beyond all controversy: but that they are protected by the provisions of the Rule, as at present recognised, is equally certain.

Secondly,—The other point, in regard to which, we remarked, a failure of the analogy referred to, is that of the nature and character of the term of twenty-one years super-added to the period of lives in being, allowed by the Rule against Perpetuities. It is almost needless to observe, that in the case of common settlements by particular-estate and remainder, that term enters into the period of postpone-

This analogy
unsustainable;
1. Because
Perpetuity-
rule admits of
arbitrary
lives.

2. Because
term of
twenty-one
years is
absolute.

fine or common recovery, he may acquire the absolute fee; but at the end of the same period, personal estate

must vest absolutely." *Butler's note* to F. C. R. pp. 566, 567.

ment, only as coincident with the infancy of the tenant in tail in remainder ; and even when so coincident, only to the extent of that portion of the minority of the tenant in tail, unexpired at the determination of the preceding estates. On the other hand, the term of twenty-one years allowed by the Rule against Perpetuities, is absolute, and wholly independent of the infancy of any person taking under the Executory limitation, or under any of the prior gifts which are defeated by it. Indeed, it may so happen, that the person entitled under the Executory limitation, at the expiration of the extreme period of lives in being, and twenty-one years, may be an infant ; an event which would, of course, occasion a further postponement of the acquisition of complete power over the property, until his majority : nor is there anything to prevent a donor so framing his gifts, as that the person taking at the expiration of the period of postponement shall *necessarily* be an infant. This, also, is, manifestly, an encroachment upon the spirit and original design of the Rule against Perpetuities : although the use of an absolute term of twenty-one years in periods of postponement, is now established, as firmly as any other branch of the Rule.

But period of time borrowed from possible suspension of power over inheritance, under ordinary settlements,

In these two respects, therefore, we observe, a material deviation from the analogy which is supposed to exist, between the period for which the acquisition of full power over property may be deferred, under the ordinary modes of settlement, and the period within which future interests in property are allowed to vest by the Rule against Perpetuities. That the idea of lives in being and twenty-one years forming the extreme period of remoteness was originally borrowed from, and was ultimately made a rule, by analogy, to the possible course of things under common settlements, there can be little doubt : but the *reasons* and *principles* of the analogy having been disregarded, and an accordance in the bare *outline* of the subjects of the supposed common relation, only remaining, it is idle and nugatory to make any serious effort to sustain it.

CHAPTER XIV.

ADJUNCTS OF, OR RULES ACCESSORY TO, THE RULE AGAINST
PERPETUITIES.

1. The boundary fixed by the Rule against Perpetuities for the creation of future estates by way of Executory devise and Springing and Shifting Use, is universally the same; whether the subject of the limitation be inheritance, terms for years, or chattels personal. Distinctions, it is true, were formerly attempted to be taken between limitations of the inheritance, and of chattels, on the ground that the exility of terms for years, and the perishable quality of chattels personal, did not admit of the extension to them, of the period of remoteness which obtained in regard to the freehold and inheritance. But the whole course of modern adjudications, downward from the duke of *Norfolk's* case (as respects chattels) and the case of *Stephens v. Stephens* (as respects inheritable property), has completely established, that every Executory limitation of real or personal property, whether by deed or will, must be tested by one common rule of remoteness, conformity to which is absolutely essential to its validity.

1. Rule against Perpetuities applicable equally to limitations of real and personal estate.

2. The limits prescribed to the creation of future estates and interests are the same, both at law and equity: the Rule against Perpetuities is of equal force, and its provisions are administered with equal strictness, in both jurisdictions. It may be questioned, indeed, whether this uniformity of practice flows from or proves the rule, *æquitas sequitur legem*, for the approved aphorism, *palnam qui meruit ferat*,

2. And binding alike at law and in equity.

requires us to admit, that the Court of Chancery has had by far the greater share in the determination and settlement of the wholesome provisions of the laws against remoteness. The truth, however, is, that these salutary restrictions have grown up under the fostering care of the Courts of both jurisdictions; whose exertions have been sympathetic and accordant, and have resulted from an equally full persuasion of the evils of immoderate restrictions on the right and power of alienation.

3. Rule requires a limitation to be such as will necessarily take effect within proper period.

3. It is not sufficient, in order to test the legality of a limitation, to inquire whether it be *capable* of taking effect within the period prescribed by the Rule: it must be so framed as, *ex necessitate*, to take effect, if at all, within that period. Thus, if land be limited to A. in fee, and if he die under twenty-one, or unmarried, or without going to Rome, then to such sons of B. (who is living) as shall attain twenty-two. Here, it is *possible*, that B. may die before A. attains twenty-one, or while he is unmarried, or before he has been to Rome; in which case, all B.'s children would, probably, attain twenty-two (if at all) within the period required by the Rule against Perpetuities. But it is also possible, that A. may die under twenty-one, or unmarried, or without going to Rome, in the lifetime of B., and B. may have issue born after his own death; in which case, such after-born issue would not attain the specified age until the expiration of the period fixed by the Rule. That possibility (however remote) is of itself sufficient to vitiate the whole of the limitation: it must be a matter of *positive certainty*, that, if the limitation take effect at all, it shall do so within the period fixed for the vesting of executory interests.

4. Limitations good or bad under the Rule, irrespectively of subsequent events.

4. A limitation which will not necessarily take effect, if at all, within the period prescribed by the Rule against Perpetuities, and which is, therefore, according to the rule just mentioned, bad in its inception, will not be substantiated or made valid by any events happening subsequently to the

time of the creation of the limitation. Thus, where (t) a testator devised his real estate to trustees, in trust for his son for life, and after his son's death, in trust to sell, and stand possessed of the proceeds, in trust for all his grand-children, the children of his son and three daughters, (whom he named) who should attain the age of twenty-four years, and the son and daughters had children living at the testator's death, but none born afterwards:—it was held, that the trust for the grand-children was wholly void for remoteness. In this instance, we see a perfect exemplification of the rule, that regard is to be had to possible, and not actual, events, and that the fact, that the gift *might* have included objects too remote, is fatal to its validity, irrespectively of the event. The *possible* event was, that children might have been born to some or one of the testator's sons and daughters, after his decease, who should not attain twenty-four years of age, until after the expiration of twenty-one years from the decease of their parent, in which case, the vesting of their shares would have been postponed beyond the period of lives in being, and twenty-one years. The *actual* event was, that all the grand-children, objects of the gift, were born in the testator's lifetime; notwithstanding which, however, they were *all* excluded from the benefits intended them. (u)

5. The time from which the period fixed by the Rule against Perpetuities is to be computed, being the *creation* of the limitations requiring its application, that computation must be made at the date of the deed, when the limitations are created by instrument *inter vivos*, and at the *death of the testator*, when they are created by will. And this leads

5. Period of remoteness: computed either from date of deed, or death of testator.

(t) *Newman v. Newman*, 10 Sim. 51. And see 1 Jarm. Wills, 233.

(u) This rule is subject to an exception as to Executory limitations to take effect on *either of two contingencies*, one of which is within, and the other, without, the limits prescribed

by the Rule against Perpetuities; and where, therefore, events must be looked at, in order to decide the destination of the property, in respect to one or other of the alternate limitations. *Vide infra*.

us to observe, in passing, the extraordinary inconsistency between the rule, which fixes the death of the testator as the time at which the period of remoteness is to be computed, in the case of wills, and the rule, last considered, which, in deciding on the validity of testamentary dispositions, in regard to the law of perpetuity, refuses to look at the state of events subsequently to the date of the will, although the death of the testator is the period for ascertaining the objects of his bounty.

6. Twenty-one years absolute the only available period, if lives in being not included.

6. It is to be observed, that whenever lives in being do not form part of the time of suspension or postponement, the only period allowable under the Rule against Perpetuities is twenty-one years absolute. (v) The not resorting to one distributed portion of the whole period cannot and does not warrant the increase of another portion, of a kind or species totally different. Moreover, the frailty and uncertain duration of human life is such, that it does not admit of estimate or periodical computation in any given case; and, therefore, no fixed term can properly be substituted for a life, in cases where that life might have been included in, and produced a consequential increase of, the period of remoteness.

7. Limited or partial estates may be created within whole allowed period, as well as the fee or absolute interest.

7. If a limitation be good within the Rule against Perpetuities, it is of no importance whether it confer the fee or absolute property, or any less or partial interest, as for life, or otherwise. (w) Whatever the nature or quantum of estate may be, the whole period allowed by the Rule may be taken advantage of for the purpose of giving it effect. Any ulterior limitation of the whole estate expectant upon the determinable interest, must be conformable to the provisions of the Rule, and its validity will be tested by them alone. The mere circumstance of its postponement to a gift of a qualified estate, which, to be valid, must not transgress the legal boundaries of remoteness, neither necessitates nor admits of its

(v) *Vide Crooke v. De Vandes*, 9 Ves. 197. *Palmer v. Holford*, 4 Russ. 408. *Burt, Elem. Comp.* 269, 270. 1 Jarm. Wills, 230. (w) 1 Jarm. Wills, 239.

violation of the laws of perpetuity, in respect of its *vesting*; although that circumstance may have the effect of delaying the time of the ultimate limitation taking effect in *possession*.

8. The remoteness against which the Rule for prevention of Perpetuities is directed, is remoteness in the commencement, or first taking effect, of limitations, and not in the cesser or determination of them. An estate that is to arise within the prescribed period, may be so limited as to determine on the happening of any event, however remote, as, for example, the indefinite failure of issue of a person; which, we shall presently see, is too remote a contingency, for the commencement of limitations. But an estate can only be made to determine upon an event thus remote, when, by its *original form and limitation*, it will regularly cease by the happening of the contingency, as the term of the duration of the estate; for, as will hereafter be seen, a *power* reserved to a person to determine the limitation on such remote event, would be void. An instance of this kind of valid termination of an estate, is to be found in the limitation of a term of one-thousand years, to A., if B. shall so long have issue, or until the death of B. without issue.

8. Rule against Perpetuities does not affect remoteness in cesser of limitations.

9. To render a gift valid within the Law against Perpetuities, it is not necessary, that the object of it should be at once pointed out or ascertained, for it is immaterial in what way the description is made, so as there cannot be any doubt who is the person designated by it, when the period arrives, at which the gift is to take effect. Thus, if a limitation were made to A. in fee, subject to a gift-over, to take effect in case any person, living, or born on the day of his death, shall appear at *St. Paul's*, within twenty-one years after the death of A., the gift-over would be good; for the happening of the event would make the person certain; and, *id certum est quod certum reddi potest.* (x)

9. Not necessary that object of limitation be at once ascertained, if ascertainable when gift takes effect, and within proper period.

(x) *Per. Preston, arguendo, Bengough v. Edridge*, 1 Sim. 253, 254.

CHAPTER XV.

OF THE RULE AGAINST PERPETUITIES, AS APPLICABLE TO
LIMITATIONS AFTER A FAILURE OF HEIRS OR ISSUE.

Importance of the class of limitations here brought under consideration.

WITHIN the extensive range of real property law, there is, perhaps, no one subject, which has given rise to so much and such varied discussion, and in which, at the same time, the applicability of the Rule against Perpetuities is so immediately apparent, as that proposed for consideration in the present chapter.

Simple illustration of it, and its connexion with Rule against Perpetuities.

To give a general idea of the nature of the subject to be considered, anterior to its formal distribution,—let us suppose, property devised, or limited by deed, to B. in fee, after the death of A. without issue, or without having issue: does the limitation to B. (a limitation, it will be seen, in the nature of an Executory devise *in futuro*, or Springing Use, as the case may be,) contravene the Rule against Perpetuities? or, rather, is the event, on which the limitation is to take effect, too remote, when tested by the standard of remoteness fixed by the Rule in question? In order to give a satisfactory answer to this inquiry, it must be understood, that the words “dying without issue,” and “dying without having issue,” mean, in the eye of the law, death, and the want or failure of issue, *whenever that failure may happen*, be the time of the event ever so distant; so that, if a person die, leaving issue surviving him, yet, the subsequent extinction of his line of issue is the fulfilment of the required event. (x) To revert to the case supposed,—A. may die,

Words importing death without issue mean, primarily, failure at any time.

(x) Harg. Law Tracts, 518, 519. Burt. Elem. Comp. 224.

leaving children and grand-children, and they, or their descendants, may live for centuries; but still, whenever there shall cease to be any issue of A., (however remote the period) the event on which B.'s estate was limited to take effect in possession, will have happened. Such being the character of the gift, does it comply with the rule of law, that every executory estate must be so limited, as necessarily to take effect, if at all, within a life or lives in being, and twenty-one years? Obviously, not. The invalidity of the limitation is, therefore, at once ascertained; and *that*, irrespectively of events subsequent to the time of its creation, as, for instance, the death of A. without leaving any issue surviving him, or the extinction of such issue within twenty-one years from A.'s decease. Now, this is the simplest instance of the class of limitations which we at present propose to consider, in its relation to the Rule against Perpetuities.

Our subject thus divides itself:—

1st; Springing and Shifting Uses and Executory devises, to take effect on the death, and *failure of issue*, of a person to whom the property is before limited, or of a stranger:

Formal distribution of the subject.

2nd; Springing and Shifting Uses and Executory devises, to take effect on the death of a person without *heirs*: And,

3rd; Executory limitations *of terms of years* and *personal chattels*, to take effect on the death of a person without issue.

But, as by the recent statute (1 Vict. c. 26) for the alteration of the law with respect to wills, the construction of *testamentary limitations* to take effect on a dying without issue, has undergone considerable alteration, it will be necessary to consider the first and third branches of our subject, as well in reference to the old rules of law, which will for a long time have place, as in their connexion with the modern enactment alluded to. It will, therefore, be understood, that until express mention is made of the new statute, the various questions under consideration are being discussed upon the

Consideration of effect of statute, 1 Vict. c. 26, postponed.

footing of the rules which obtained prior to the year 1838, when that statute came into operation. The rules of law, applicable to the construction of these limitations in *deeds*, have not experienced any statutory change.

SECTION I.

Springing and Shifting Uses and Executory devises, to take effect on the Death, and Failure of Issue, of a person to whom the Property is before limited, or of a stranger.

Limitation to A. and his heirs, and if B. die without issue, to C.

I. With respect to the first class of limitations. If land be limited to A. and his heirs, but if B. die *without issue*, or *without having issue*, or, even, without *leaving issue*, then to C.; it is clear, that the limitation to C. is too remote and void, inasmuch as it is to take effect in possession on an event which is indefinite, and not such as will necessarily happen within the period prescribed by the Rule against Perpetuities. And this indefiniteness in the specified event will be fatal to the limitation, although there be but the remotest possibility of B.'s ever having any issue, and although the probability of his dying without issue be so great, as almost to amount to a moral certainty.

Similar gift, prior interest being limited.

The same rule holds, whatever the nature or extent of the estate limited to the first taker, whether in tail, for life, or for a term of years.

Limitation to A., on death of B. without issue.

It has been already seen, that a gift to A. on the death of B. without issue, (and, also, without leaving issue,) neither A. nor B. taking any previous estate, is void for remoteness. But this rule must be understood subject to one exception in regard to certain limitations in wills, to be hereafter noticed. (y)

(y) *Vide infra*, p. 181, 182.

The next class of these gifts which occurs for consideration is, where the failure of issue referred to, is that of a *prior donee* or *devisee*. It will be convenient to consider limitations in wills and deeds separately, as to this point.

Limitations on death without issue of prior donee or devisee.

Suppose, for example, land be *devised* to A. and his heirs, but if he die without heirs of his body, or without issue, to B. It is true, *in terms*, an estate in fee is given to A., and a limitation is superadded, which, on the supposition of A. taking such an estate, can only be good by way of Executory devise; and it is also true, that if A. take a fee-simple, the Executory devise must be void as too remote. But the law regards the limitations in question in quite a different light. The testator has shown, by limiting over the property to B., on the death of A. without issue, that A. and his *issue* were the intended objects of the preceding gift; and that A. was not to have such an estate as the law raises under a limitation to a man and his *heirs*, that is, a fee-simple. The issue, and not the heirs, of A. being, with him, the objects of the gift, the law pays respect to such intention, and decides, that that purpose may be effected by giving A. an estate less than a fee-simple, and an estate, too, the alienation of which, in bar of the issue, requires greater solemnities than does the alienation of a fee-simple. All this is effected, by curtailing the estate expressly limited to A., from a fee-simple, to a fee-tail. A. being thus placed in the same position, as if the gift had been, in terms, to him and the heirs of his body, the further consequence ensues, of the capability of a *remainder* being limited after the estate-tail of A.; and the fact of the ulterior limitation being to take effect on the failure of issue of A. becomes of no importance; such failure of issue being the regular and proper limit to the estate-tail, or, rather, the latter being coterminous with that event. Then, that which in this manner becomes *possible*, is further rendered *necessary*, by the rule of law, that whenever a limitation can take effect as a remainder, it shall never operate as an Executory

Gift by will, to A. in fee, with limitation over on his death without heirs of his body or issue.

And therein, of the rule which curtails the fee into an estate-tail;

And gives effect to the ulterior limitation as a remainder.

devise. (2) By such means, this twofold end is secured : an estate is raised in A., better adapted to the purpose of benefiting his issue, than an estate in fee-simple ; and the ulterior limitation to B., which, as an Executory devise, is too remote, as being to take effect after an indefinite failure of issue, is validated as a remainder expectant on the determination of the previous estate-tail in A. True it is, that *eventually*, the legal construction of estate-tail and remainder may effect the objects of the testator to no greater extent, than would the limitations as originally inserted in the will ; inasmuch as, A. may bar his estate-tail, and destroy the estates of his issue ; which would be equivalent to an alienation of the fee-simple ; and may also destroy the remainder in fee to B. ; which would answer to the *ab origine* invalidity of the Executory limitation (regarded in its primary character) on the ground of remoteness. But, still, the limitations, according to their legal construction, *may* carry out the objects of the testator, if A. do not exercise his power of barring the entail and destroying the remainders ; whereas, unaided by the legal construction in question, one intention (that of limiting the property to B. in the case of A.'s death without issue) must, in *any* event, fail of effect, because a limitation depending on such an event, and operating otherwise than as a remainder, is void *ab initio*.

This construction exemplified in *Doe d. Ellis v. Ellis*.

It will suffice to mention one case in which this rule was acted upon. In *Doe d. Ellis v. Ellis* (a) there was a devise to the testator's son in fee ; but if he should die without issue, then to the child of which the testator's wife was *enceinte* ; and it was decided, that this gave an estate-tail to the testator's son, with remainder-over, and not a fee, determinable on his death without issue living at that time.

(2) *Vide supra*, p. 75.

(a) 9 East, 382 ; in addition to which, see *Soule v. Gerrard*, Cro. Eliz. 525 ; *Tuttesham v. Roberts*, Cro.

Jac. 22 ; *Brown v. Jerreas*, ib. 290 ; *Brien v. Smith*, Willes, 1. And on the general doctrine, see 1 Jarm. Wills, 487.

But not only where land is limited by will, *in fee*, with an Executory devise on the failure of issue of the first taker, does the law thus lend its assistance to testamentary limitations otherwise partially void on the ground of remoteness; but also where a gift is made to A. for life, (b) or indefinitely, (c) with an Executory limitation-over to B., in the event of his dying without issue, an estate-tail is invariably raised in the first taker, by implication. (d) In these cases, there is the same argument for increasing the estate of the first taker, as in the former, for curtailing it; namely, the manifestation of an intention to provide for his issue, which the law will carry out by moulding the limitations into a form better adapted to the purpose. Nor can the ulterior limitation in favor of B. take effect as an Executory devise, any more than if the prior estate limited to A. were a fee-simple; the event being, in both cases, the same, and, therefore, equally objectionable on the ground of remoteness. But, as a remainder, it may well take effect, in the same manner as if the first taker had an estate-tail by express limitation. Thus, the designs of the author of the gift, and the limitations by which they are intended to be carried out, are harmonized; and the latter are subjected to a construction, which protects them from the destructive operation of the Rule against Perpetuities.

Same construction, where prior gift is for life, or indefinite.

As to this class of limitations in *deeds*, the doctrine of constructive implication of estates-tail is not applicable to an equal extent; the construction of gifts by instruments *inter vivos*, being guided by stricter rules, than are usually

This construction not admitted so freely in deeds.

(b) *Sonday's case*, 9 Rep. 127 b. *Sparrow v. Shaw*, 3 Bro. P. C. 120. *Doe v. Halley*, 8 T. R. 5. *Langley v. Baldwin*, 1 P. Wms. 759. *Stanley v. Lennard*, 1 Eden, 87. *Attorney-General v. Sutton*, 3 Bro. P. C. 75. *Blackburn v. Edgeley*, 1 P. Wms. 635. And see remarks of Lord Gifford, M.

R., in *Green v. Ward*, 1 Russ. 264; Fonbl. Eq. lib. 2, cap. 3, ss. 3, 4. Burt. Elem. Comp. 222.

(c) 4 Bac. Abr. 256. Fonbl. Eq. lib. 2, cap. 3, ss. 3, 4. Burt. Elem. Comp. 222.

(d) See *Machell v. Weeding*, 8 Sim. 4; 1 Jarm. Wills, 488.

applied to testamentary dispositions, and a closer conformity to the principles of the Common law being insisted upon.

Limitation by deed to A., and his heirs, with gift over, on his death without heirs of his body or issue of his body.

A limitation, however, by deed, to A. and his heirs, with a gift-over on his death, without *heirs of his body*, or without *issue of his body*, will have the effect of vesting an estate-tail in the first taker, with a remainder expectant thereon in the ulterior donee. (e)

So, also, under a gift to A., without any words of limitation, and a subsequent gift to B., on A.'s death, without *heirs of his body*, A. will take an estate-tail, with remainder to B.

This construction, as Mr. *Preston* has observed, (f) "depends on the rule, that all the clauses of a deed are to be taken into consideration together, and construction made on the several parts. The entire instrument must be construed by its parts, so that every clause, and every word of every clause, may have effect, unless it be insensible or repugnant, or contrariant to the former part of the deed; or unless it be inconsistent with the rules and policy of the law. Wherever it is to be collected in construction on the clause of immediate gift of the estate, or from a clause which introduces the limitation of another estate, or refers to another part of the same instrument, or to another instrument, that the gift under consideration is not to extend the benefit of the limitation to any heirs, besides those which are of the body of the donee; the generality of the word heirs will be qualified and restrained to mean *heirs of the body*."

What necessary to raise the construction of implied estates-tail in deeds.

But it is absolutely necessary, in order to the construction of an estate-tail being admissible in deeds, that the word "heirs" should occur in the gift, either in terms, or by reference, and adoption; (g) and, therefore, under a gift to A., and on

(e) 2 *Prest. Estates*, 504.

(g) *Ibid.* 484.

(f) 2 *Essay on Estates*, 485.

his death, *without issue*, or *without issue of his body*, to B., A. will take only an estate for life, with a contingent remainder expectant thereon to B., which will take effect, if A. leave no issue at his death, (being the time of the determination of the particular-estate). It is conceived, however, that if the first limitation were for life *expressly*, it could not be enlarged into an estate-tail, even though the gift over were limited to take effect on the death of the tenant for life, without *heirs of his body*; as such a construction would be "repugnant and contrariant" to an express provision of the deed.

Again, it is needful, to support the construction in question, that the gift should contain *words of procreation*, descriptive of those heirs which shall be the issue of the body of a particular person. (*h*) It follows, therefore, that a gift to A., and his heirs, and if he shall *die without issue*, (without any provision as to the issue being *of the body of the donee*) to another, will vest the fee-simple in A., and the ulterior limitation will be void. (*i*)

None of these requisites exist, it will be perceived, in regard to the enlarging or abridging of limitations created by will; for in *all* the cases which have been here mentioned, the gifts, if testamentary, would have passed an estate-tail to the first taker, with an expectant remainder. (*k*)

Again, in certain cases of limitations in wills, an estate-tail may be raised by implication in a person, although no express estate is given to such person, and the ulterior limitation be thereby validated as a remainder, expectant on the implied estate-tail. Thus, (*l*) suppose, a testator devises land *to his heir-at-law*, (whether apparent or presumptive,) in fee, in the event of the death of A., without

Estate-tail raised by implication under devise on failure of issue of testator's heir, or to his heir, on failure of issue of another.

(*h*) Ibid. 481.

(*i*) *Serape v. Rhodes*, 2 Com. Rep. 541.

(*k*) The student cannot be too strongly recommended to peruse, once and again, the elaborate disquisition

of Mr. Preston on the language by which estates-tail may be created, in vol. 2, of the *Essay on Estates*, pp. 473—555.

(*l*) 1 Jarm. Wills, 487.

issue, but does not limit any estate expressly to A. or his issue; the irresistible presumption is, that the testator intended the property to devolve on A. and his issue, inasmuch as the person to whom the land is devised, on failure of that issue, is the very individual on whom, unless an estate-tail be raised in A., by implication, the law *immediately* casts the inheritance; and it would be absurd to suppose an express devise to the heir, to take effect at a specified period, unless in the meantime the testator intended some other person to take the devised property. So, again, if a devise be made *on the general failure of issue* of a person, who stands in the relation of *heir-at-law* of the testator; the same rule holds, as in the case of an express devise in fee, with an Executory limitation-over on the death of the first devisee without issue. An estate-tail is raised by implication in the heir, and the limitation expressed in the will to take effect on the failure of his issue, becomes a remainder expectant on the implied estate-tail. (m)

It may be observed, that although the case of a devise to a person, who is the testator's heir, on failure of the issue of another, to whom no estate is expressly devised, is generally considered as admitting and calling for the application of the doctrine of the implication of estates-tail, no precise authority can be cited for the doctrine. By analogy, however, to the clearly established rule in regard to the implication of estates, where property is devised to an heir, *after the death* of a person not taking by express gift, (n) it is conceived, little doubt can be entertained that the doctrine in question is sustainable.

But a Court of law will not deprive the heir, of his right to take the inheritance in fee-simple of his ancestor, upon grounds of mere conjecture: there must be either an

But to curtail
the fee of the
heir into an
estate-tail,

(m) *Walter v. Drew*, Com. Rep. 373. 2 Prest. Abst. 160. 1 Jarm. 176. Wills, 491. (n) See *Blackwell v. Bull*, 1 Keen,

express devise, on failure of issue of the heir, or such a clear manifestation of intention on the part of the testator, as to be equivalent to a direction that the estate shall go over on that event. Thus, in the late case of *Doe d. Cape v. Walker*, (o) a testator, having a son and granddaughter, (child of a second son,) issue of one marriage, and a son and daughter, issue of a second, after giving legacies to the issue of the second marriage and the granddaughter, bequeathed thus:—"But if it should happen that my son, W. W., (the eldest) *should marry or contract matrimony, and have heirs of his own*, then I order and direct that my will is, that my executors shall pay, or cause to be paid, unto my granddaughter, M., the further sum of 100*l.* more, in addition to the 100*l.* before bequeathed to her, to be paid *within twelve months after the birth of my son W.'s first child*." And after intermediate dispositions, he devised as follows:—"In case it should happen that my son, W., *should depart this life, and leaving no heirs lawfully begotten, and that my freehold messuage and tenement situate at, &c., should fall by descent unto my granddaughter, M. W., and she inherit and possess the same*, then my said granddaughter shall pay out of the said messuage," several legacies mentioned by the testator. W., the eldest son, having died without issue, and disposed of the property by his will, it was contended, on behalf of the issue of the granddaughter, M., (who died before W.) that W. took only an estate-tail, with remainder to M. in fee: another point, marked for argument, on the same side, (but apparently not insisted on) was, that there was an Executory devise to M., in the event of W. dying, without issue of his body living at his decease. Lord C. J. *Tindal*, in delivering the judgment of the Court of C. B., first observed, that it was

there must be a clear devise on failure of his issue, or what is equivalent to it.

(o) 2 Scott, N. S. 317. See also, as to the same point, *Newton v. Barnardine*, F. Moore, 127; S. C. *sub nom.* *Cosen's case*, Owen, 29, and ob-

servations upon it, 2 Scott, N. S. 335, 336; and also *Tilly v. Collyer*, 3 Keb. 589.

clear, that supposing an unequivocal devise-over to M. was to be found in the expressions of the will, the heir-at-law would, by implication, take an estate-tail; it appearing to be the necessary construction of the words, "that if my son W. should depart this life, &c.," that those words pointed to an indefinite failure of issue of his son, from which an estate-tail might be implied. The learned judge, then, after going through the different circumstances arising on the will, said, these circumstances had, undoubtedly, a strong tendency to show, that the testator contemplated the succession of M. to the estate, in case his eldest son should die without issue; and that, perhaps, he meant that she should do so. But the testator, not having made any express disposition affecting the right of his heir-at-law, might, without imputing to him any intention contradictory to the rest of his will, have intended to direct, *that if his heir-at-law should not exercise his power of disposing of the estate*, in consequence of which the estate should descend, in the proper sense of the word, to M., to whom it would rightfully descend, in the absence of any disposition of it by W., she should, out of the estate, pay certain legacies. Here, the question was, not merely, whether the words of the will were such as might warrant an implication of an estate-tail in W., but whether a remainder to M. was to be implied from the terms of the will, which expressly spoke of the taking by descent, and which might be satisfied, in the legal sense, without having such effect. Judgment was, therefore, given for the party claiming under the will of W., the testator's heir.

If no estate-tail can be raised by implication, limitations on general failure of issue, void.

In all cases, however, of Executory limitations, (either by deed or will) divesting estates expressly limited, after a general failure of issue, other than those in which there is a previous devise or limitation, (whether in fee, or for life, or indefinite,) susceptible of enlargement or modification, (*p*)

according to the distinctions above stated, the rule of law is, that no estate-tail can be raised by implication, so as to preserve them from the objection of being too remote. They maintain their primary character of Executory devises, and, as such, they necessarily incur the fate of limitations, to take effect on events not confined within the period fixed by the Rule against Perpetuities.

Of this kind, (in addition to the limitation, before considered, to A. and his heirs, and if B. die without issue, to C. and his heirs,) is a limitation to A. and his heirs, and if A. and B. die without issue, to C. and his heirs. Here, there being no previous estate in B., which, with that of A., might be enlarged or modified, so as to admit of a remainder expectant upon it, the ulterior limitation to C. can only take effect as an Executory devise, or Springing or Shifting Use, and, as such, it is void, as contravening the Rule against Perpetuities. (q)

Gift to A. in fee, and if he and B. die without issue, instance of such a void limitation.

So, also, in every case of a limitation *in futuro*, by deed or will, after the death of a person without issue, (to whom no preceding estate is given) where neither the person in default of whose issue the limitation is to take effect, nor the person to whom that limitation is made, fills the character of heir-at-law of the testator, (this reservation applying only to wills) no estate can be raised by implication, and the gift is, consequently, void *ab initio*.

Limitation *in futuro* after death of a person without issue, void, unless estate-tail can be raised under doctrine as to heir-at-law.

In regard to limitations in deeds to arise *in futuro*, on

(q) *Scrope v. Rhodes*, Com. Rep. 541. *Gardiner v. Sheldon*, Vaugh. 259. And see *Doe v. Lucraft*, 1 Mo. & Sc. 573. 2 Prest. Estates, 529, 536. The author is aware of the cases of *Doe d. Tenny v. Agar*, 12 East, 252, and *Romilly v. James*, 6 Taunt. 263, which have been deemed authorities tending to the establishment of a doctrine, different from that laid down in the text; but it may

suffice to observe of those cases, that in neither of them was any decision called for on the point under consideration, and that, therefore, *dicta* in either, seemingly opposed to the doctrine here laid down, must be regarded as extra-judicial. See the cogent observations of Mr. Jarman, in his Treatise on Wills, vol. 1, pp. 494, 495.

the death without issue of a person not taking any previous estate, no respect can be had to the circumstance of such person being the heir-at-law of the donor, or of that character being filled by the person taking under the Executory gift, and, therefore, no implied estate-tail can be raised to support the limitation, and it will, consequently, in *every* case, be void for remoteness.

Limitations on failure of issue restricted to death of ancestor.

The instances, hitherto considered, have been those only of Executory limitations, to take effect after a general or indefinite failure of issue, that is, a dying without issue at whatever period of time it may happen. In all such cases, we have seen, that (except where an estate-tail can be raised by implication, according to the distinctions previously laid down,) the remoteness of the event is fatal to the limitation. It will now be proper to speak of such Executory estates as are limited upon a failure of issue not unrestrained, but to happen *within a specified period of time*, as a life or lives in being, or lives in being and twenty-one years, or the like.

Instances of these.

Thus, to take a simple instance, if land be devised or limited to A. and his heirs, but if he die without issue living at his own decease, or if he die without issue during the life of B., then to B. and his heirs; it is clear, that though the event of the failure of issue of a person is indefinite, and, therefore, *per se*, too remote, and, so, an Executory limitation depending upon it, would be void, yet, as in the cases supposed, the dying without issue contemplated, is to be ascertained within, or at the expiration of, a life in being, there can be no objection to the ulterior limitation in favor of B. taking effect as an Executory devise or Shifting Use, so far as respects the remoteness of the contingency. This doctrine was settled, so long ago as the reign of James I, by the decision in the before-cited case of *Pells v. Brown*. In that case, it will be remembered, the testator devised lands to *Thomas*, his second son, and his heirs for ever, and if *Thomas* died without issue, *living William*, his

brother, then *William* was to have the lands to him and his heirs and assigns for ever. It was held by all the judges, that this was a good limitation of the fee, upon the contingency of *Thomas* dying without issue, in the lifetime of *William*; and that it did not operate as a remainder, but as an Executory devise. And such has been the rule of law, ever since this decision.

With regard to the difference in the construction of a limitation to take effect after a general failure of issue of the first taker, and a limitation after his death, without issue, living at that time, two things are to be observed. *First*, the failure of issue, upon which the Executory limitation is to arise, being limited to happen during the life of a person in existence, there is no danger of tendency to a perpetuity in such Executory limitation; because, if the first taker die, leaving behind him a child or other issue, (and this, as well in the case of the dying without issue being confined to the life of another person, as in that of its being restrained to the first taker's death,) although such issue survive him but a single day, the contingency fails, and the first estate becomes absolute; whereas, if the first taker die without leaving issue, living at the time of his decease, the Executory limitation at once vests. In either case, a life in being decides the destination of the property, and there is, therefore, no objection to the ulterior limitation taking effect as an Executory devise, or Shifting Use, on the ground of any supposed remoteness in the event. *Secondly*, in regard to a gift of this kind, it is to be noticed, that as the gift-over is to take effect, in the event of the first taker dying without issue *living at the time of his death*, it cannot properly have the effect of curtailing the prior estate in fee to an estate-tail, as it would do, were the failure of issue unrestricted. (r) For as

Limitations on a restricted failure of issue do not tend to a perpetuity.

And no estate-tail can be raised by implication from them; nor necessary that it should be.

(r) See observations of Lord Ellenborough in *Doe v. Webber*, 1 B. & Ald. 721, and of Lord Gifford, M.R.

in *Greene v. Ward*, 1 Russ. 264, and the case of *Doe d. Barnfield v. Wetton*, 2 Bos. & Pul. 324; and Burt.

the ground of cutting down a limitation in fee to an estate-tail, is, the presumed intention of the author of the gift, to provide for *all* the issue who would be inheritable to an estate-tail created in express terms; and as the event described in the limitation in question (*viz.*, the failure of issue living at the death of a particular person) is not that by which an estate-tail is necessarily determined or extinguished; such an estate being coterminous only with the failure of issue at *any* time; the raising an estate-tail in the first taker, by implication, would be not only unnecessary, but even ineffectual, for carrying out the supposed intentions of the donor, or testator. And, accordingly, there is not to be found any instance of property being given to a person in fee, with a limitation-over in case he should die without leaving issue at the time of his death, in which the previous fee has been cut down to an estate-tail, by force of the limitation-over.

Same, if the failure of issue be confined to lives in being.

The preceding observations as to remoteness are equally applicable to an Executory limitation, to take effect on a failure of issue during the lives of any number of persons *in esse*; the period of such lives being, in fact, only the duration of the life of the survivor.

Or to lives in being and twenty-one years.

And, still further, there is no objection on the ground of remoteness, to an Executory devise or Shifting Use, to take effect upon the failure of issue of the first taker within twenty-one years after a life or lives in being. (*s*) Thus, if land be devised or limited to A. and his heirs, but if A. die, without issue living at the time of his decease, or if he die leaving issue, and all such issue shall die under the age of twenty-one years, then to B. and his heirs. The contingent event on which the Executory limitation in favor of B. is to vest, must necessarily happen, if at all, within the period of a life in being, and twenty-one years; because, A.'s issue must all be born in his lifetime, (or, at all events, within a few months after his decease, which, in the eye of the law,

Elem. Comp. 223, 1 Jarm. Wills,
490, 2 Jarm. Pow. Dev 564.

(*s*) *Sheffield v. Lord Orrery*, 2 Atk.
282. F. C. B. 470.

is the same thing,) and such issue must, of course, either die in infancy or attain their majority within or by the end of twenty-one years from the time of A.'s decease; either of which events will be decisive of the destination of the property.

And the rule, that limitations after a failure of issue are valid, if the ascertainment of such failure be confined to the period prescribed by the Rule against Perpetuities, is equally applicable, although there be no prior gift to the person on failure of whose issue the limitation is to take effect, or, if there be such a gift, notwithstanding the fact of its being only for life, indefinitely, or otherwise; always observing, that an estate-tail neither is, nor is necessary to be, raised by implication, in any person, (t) by reference to the construction, which obtains in the case of similar limitations after a general or indefinite failure of issue. It may, also, be further remarked, that by the rule now under consideration, a limitation to A. in fee, with an Executory devise or Shifting Use, on the death of B. without issue, (or, on the death of A. and B. without issue,) living C., to C., is equally free from objection, on the ground of remoteness, with a limitation to A. and his heirs, and if he die without issue living at his decease, to B. and his heirs; of which mention has been before made.

Same rule as to restricted failure, whatever the character of prior gift, or although no such gift.

And although failure of issue have reference to a stranger.

Thus far, probably, little difficulty will have been experienced, in attaining a clear perception of the difference, both in their nature and consequences, between an Executory devise or Springing or Shifting Use, to take effect after a general or indefinite failure of issue, and a similar limitation, to vest upon a default of issue happening in the compass of a life or lives in being, or other period within the boundaries of perpetuity. The distinction itself is sufficiently intelligible; not so easy of decision, however, has proved, the question, to which of the two classes, particular limitations (themselves wanting preciseness) belong. Nor

The question for consideration is, whether particular limitations depend on an indefinite or on a restricted failure of issue.

(t) See *Lethieullier v. Tracy*, 3 1 Lev. 11; *Greene v. Ward*, 1 Russ. Ath. 774, 793; *Pfanket v. Holmes*, 264.

is this a merely speculative inquiry, the settlement of which may be requisite to the preservation of systematic proportion and theoretic symmetry, indeed, but destitute of any practical importance. The force of this observation will be perceived, if it be remembered, that in all cases of a limitation upon a general failure of issue, in which (according to the rules and distinctions before laid down) an estate-tail may be raised by implication, the ulterior limitation (in its then character of a remainder) becomes destructible by the person in whom such estate is raised; whereas, in every case of an Executory limitation in default of issue living at a specified period, where the implication of an estate-tail is not admissible, the Executory devise or Springing or Shifting Use is indefeasible by any act of the owner of the limited fee. And, wherever an estate-tail cannot be raised by implication, the alternative is, then, nothing less than, the validity or invalidity of the Executory limitation. It will be our business, therefore, in as brief a manner as is consistent with perspicuity, to ascertain the principal distinctions which have been established in relation to this subject. That inquiry concluded, our next object will be, to discover the different exceptions to the rule rendering void limitations after an indefinite failure of issue. And to this end, it will be convenient, that the subject should receive a more minute or particular distribution.

SUBDIVISION I.

Of the expressions and circumstances giving a restricted construction to words primarily importing an indefinite failure of issue.

Inclination of
law to the
construction of

Our present inquiry must be premised with the observation, that the law, in every case of a limitation of real estate,

after or upon the failure of issue of a person (whether taking a prior estate or not,) leans to the construction of a *general or indefinite failure*, as opposed to one limited to happen within a particular time. And the reason assigned for this inclination is, that in all cases of doubt in regard to the construction of limitations, that is to be preferred, which most favors the interests of the heir-at-law.

an indefinite failure, as to limitations of realty.

The reason, indeed, falls far short of the rule; for it is obvious, the heir gains nothing by the construction of an indefinite failure of issue, except in those cases in which the limitation is not preceded by any gift to the person on failure of whose issue it is to take effect, and is, therefore, void; and not even then, as to *limitations in wills*, if such person or the devisee be the heir-at-law of the testator (when an estate-tail is raised, upon a ground quite independent of the favored construction in question); and in the cases upon deeds, where, for want of words of procreation, or of the word "heirs," a limited estate cannot be enlarged. In all other cases, either the first taker has an estate-tail, and the Executory limitation takes effect as a remainder expectant upon it, or the estate first limited becomes absolute, and the Executory limitation wholly fails; by either of which constructions, it is manifest, the heir-at-law derives no benefit whatever. Although such is the *legal* construction, however, of the words, "dying without issue," unaccompanied by any restrictive expressions or circumstances, there can be no question, that according to the common and ordinary idiom and construction of the English language, independent of any technical rules, which have been applied to the interpretation of legal instruments, those words imply a failure of issue living at the time of the death of the ancestor. (u)

Idiomatic interpretation different.

Another preliminary observation is, that as between a *testamentary gift in fee*, with a limitation-over on failure of issue of the first taker, and a similar limitation-over after a gift *for life*,

And in wills, stronger presumption in favor of that

(*) See Lord Denman's judgment in *Doe d. Cadogan v. Ewart*, 7 Ad. & El. 467; and also observations of Lord Mansfield in *Denn d. Geering v. Shenton*, 1 Cowp. 410; and 2 Pow. Dev. by Jarm. 564.

construction,
when prior gift
is for life only.

the presumption in favor of the construction of an *indefinite* failure of issue, is stronger in the latter case, than in the former. (v) And this, because the restricted construction, as applied to a limitation in fee, simply has the effect of rendering that fee defeasible on the donee or devisee leaving no issue living at the time of his decease, and, therefore, of validating the ulterior gift, which will be also indestructible; whereas, if the first gift be for life only, the consequence of the restricted construction is, to prevent any enlargement of that estate into an estate-tail, *under which the issue*, if any, *might take*, and, at the same time, to confine the benefits for the ulterior donee or devisee, to the event of there being *no* issue of the first taker living at the time of his decease; a result, both absurd and contrary to intention.

Words "leaving issue" refer to general failure, in limitations of real estate.

It has been long settled, (as the reader will have already learnt) that the words, "leaving issue," as applied to real estate, have not the effect of restricting the failure of issue to a dying without issue living at the death; but that a limitation-over, in the event of the death of a person "without leaving issue," must bear the same construction, as if the event described had been, a death "without having issue," or, "without issue," simply. (w) Thus, in a well-known case, (x) where a testator gave the residue of his real and personal estate, to his nephews, W. and G., and if either of them should depart this life, *and leave no issue* of their respective bodies, then he gave the said premises to D. It was held, that as to the freehold, the words, "leaving issue," imported a general failure of issue. And this deci-

(v) 2 Pow. Dev. by Jarm. 583. Prior on "Issue," 71. And see *Wyld v. Lewis*, 1 Atk. 432; *Simmons v. Simmons*, 8 Sim. 22.

(w) See *Powell's* note to F. Ex. Dev. 200; Burt. Elem. Comp. 224; Remarks of Lord *Langdale*, M. R., in Dom. Proc., during the progress of 1 Vict. c. 26, through Parliament, Hansard, 36 vol, 3rd series, 982. One

learned writer has, however, been bold enough to advance a contrary doctrine, and to adduce in its support, two cases, one of which rests entirely on special circumstances, while the other is wholly inapplicable. See *Randell on Perpetuity*, pp. 123, 124.

(x) *Forth v. Chapman*, 1 P. Wms. 667.

sion has been expressly or tacitly confirmed by a long train of subsequent authorities. (y) It is true, that Lord *Kenyon*, on one occasion, (z) expressed a contrary opinion, but his lordship's decision in the case in question is capable of being rested, and was rested by the judge himself, upon other grounds, which we will proceed to notice. The case was this: a testator devised unto his son, P., his heirs and assigns for ever, a certain messuage, and declared his will, that in case his said son, P., should happen to die "leaving no issue behind him," then his (the testator's) wife should receive the rents, &c., during her widowhood, and after her decease or marriage, then the testator devised the property to his son, D., in fee, chargeable with the payment of 50*l.* a-piece to his daughters and their issue, within a twelve-month after D. should so enjoy the same; but in case D. should happen to die before P., and P. should not leave any issue of his body begotten, then the testator's will was, that the property should be sold, and the produce equally divided between his six daughters and their issues. On a case sent from Chancery, the Court of B. R. certified, that P. took an estate in fee, with an Executory devise in favor of the testator's son, D., in the event specified. The Chief Justice (Lord *Kenyon*) in his judgment, much relied upon the words, "behind him," as necessarily importing, that the testator meant a failure of issue "at the time of his son's death;" and he said, that the subsequent parts of the will also conveyed the same idea, for the deviser mentioned (or, as has been suggested, treated) the event as likely to happen in the lifetime of his widow. The special words in this case,

Cases of *Porter v. Bradley*, and *Roe d. Sheers v. Jeffery* considered as to this point.

(y) *Walter v. Drew*, 1 Com. Rep. 373. *Denn d. Geering v. Shenton*, 1 Cowp. 410. *Southby v. Stonehouse*, 2 Ves. sr. 611. *Daintry v. Daintry*, 6 T. R. 307. *Tenny d. Agur v. Agar*, 12 East, 253. *Dansey v. Griffiths*, 4 Mau. & Selw. 61. *Crooke v. De Vandes*, 9 Ves. 197, 203. *Doe v.*

Knowls, 1 B. & Ad. 324. *Doe v. Lucraft*, 8 Bing. 386. *Doe d. Cadoogan v. Ewart*, 7 Ad. & Ell. 636. *Franks v. Price*, 3 Beav. 182. *Doe d. Todd v. Duesbury*, 8 M. & W. 530, 532.

(z) In *Porter v. Bradley*, 3 T. R. 143.

("behind him," in addition to the word, "leaving,") it may be observed, form quite a sufficient ground for the denying the construction of an indefinite failure of issue; (a) and the decision, therefore, forms an authority for the position, that the words, "behind him," are sufficient to restrain the failure of issue to a dying without issue living at the death, and, it is submitted, for nothing more. (b) But even should it be thought, that the decision in *Porter v. Bradley* laid down the doctrine, that the words, "leaving issue," in a limitation-over of real estate, confine the dying without issue to a failure at the death of the ancestor, subsequent judges (c) have too intelligibly expressed their disapproval of such a doctrine, in general, and of the case of *Porter v. Bradley*, in particular, so far as it may tend to support it, to allow of that case being supposed to possess any authority upon the particular question under consideration, at the present day. The only other case in seeming opposition to the current of authorities upon this subject, is *Roe d. Sheers v. Jeffery*, (d) decided in B. R., like *Porter v. Bradley*, while Lord *Kenyon* was Chief Justice. In that case, there was a devise-over of *life-estates* to persons *in esse*, in case a previous devisee in fee "should depart this life and leave no issue;" and it was held, that the limitation-over took effect as an Executory devise. Lord *Kenyon*, after making an observation, to the effect that the word, "leaving," ought to operate to confine the failure of issue to a dying without issue living at the death, grounded the decision of the Court, principally, on the testator's *intention* to confine the failure of issue to the death of the first taker, as gathered from the circumstance,

(a) See the observation of *Le Blane, J.*, in *Tenny d. Agar v. Agar*, *ubi supra*; and of Lord *Denman*, in *Doe d. Cadogan v. Ewart*, 7 Ad. & Ell. 660.

(b) *Powell's* note to F. Ex. Dev. 4th edit. 209. 2 Pow. Dev. by Jarm. 575.

(c) See the observations of Lord

Eldon, in *Crooke v. De Vandes*, 9 Ves. 197; of Sir *William Grant*, in *Elton v. Eason*, 19 Ves. 77; of Lord *Denman*, in *Doe d. Cadogan v. Ewart*, *ubi supra*; and of Lord *Abinger*, in *Doe d. Blesard v. Simpson*, 3 Scott, N. S. 774.

(d) 7 T. R. 589.

that the persons to whom the devised property was given over, were in existence at the date of the will, and that life-estates only were given to them. The case of *Roe d. Sheers v. Jeffrey*, therefore, like its predecessor, *Porter v. Bradley*, must be considered as proceeding only on its peculiar circumstances, and as in no degree, oppugning the general rule as to the construction to be put upon the word, "leaving," above stated. Of this case, Lord *Denman*, in delivering the judgment of B. R. in a recent case, (e) observed,—“if supportable at all, it can only be so, on the ground of the devise-over being of life-estates.” (f)

And not only is it an undeniable rule of law, that a limitation-over after the death of a person without leaving issue, unaccompanied by any restrictive expressions or circumstances, imports an indefinite failure of issue; but it may also be laid down with safety, that an Executory limitation in *wills*, to take effect after the death of a person *without leaving children*, implies a dying without issue, generally, of such person. (g) It is true, in the ordinary and proper sense of the word, "children," it means the immediate descendants of a person, as contra-distinguished from, "issue;" but in its legal signification, as applied to testamentary instruments, (unless the manifest intent requires a different construction,) it is extended to all the descendants, whether mediate or immediate, of the ancestor. (h) Let us suppose, therefore, a devise to A. and his heirs, and if he should die without leaving a child or children, then over to B. and his heirs; as the words, "child or children," are synonymous with, "issue," A. will take an estate-tail, with remainder in fêe to B., according to the doctrine of implication of estates-tail, before considered. Or, again, if land were devised to A. and

And in wills, words, "leaving children," also refer to indefinite failure of issue.

(e) *Doe d. Cadogan v. Ewart*, ubi supra.

(f) As to this, vide infra, p. 212.

(g) *Doe d. Smith v. Webber*, 1 B. & Ald. 713. *Doe d. Blesard v. Simpson*, ubi supra.

(h) *Wyld's case*, 6 Rep. 17 a. *Royle v. Hamilton*, 4 Ves. 437. *Doe v. Cavendish*, 4 T. R. 741, 1 n. *Radcliffe v. Buckley*, 10 Ves. 201. *Doe d. Smith v. Webber*, ubi supra.

his heirs, after the death of B. without leaving children, as the words, "without leaving children," import a general failure of issue, the limitation to A. (unless either he or B. were the testator's heir, in which case an estate-tail would be raised in the first taker,) would be void for remoteness.

But not in
deeds.

It is to be observed, however, that this extension of the meaning of the word, "children," obtains only in testamentary dispositions; for in deeds, in regard to which a stricter construction of words and limitations prevails, there is no doubt, that the word, "children," would be confined to the immediate descendants of the ancestor; unless there were some accompanying expression, evidencing that the word was used in an enlarged sense. (i)

Words, "leaving children," even in wills, more easily confined to immediate offspring, than, "leaving issue."

And although in the case of wills, the general import of the word is not restrained to the immediate offspring, without some controlling expressions; it would yet seem, that expressions or circumstances which would not of themselves be sufficient to confine the legal acceptance of the term, "issue," to a failure of issue at the death, would have greater force, when brought to bear upon the words, "without leaving children," as contra-distinguished from issue.

Words primarily importing general failure may be confined by accompanying expressions and extrinsic circumstances.

Whatever the words in which a dying without issue is expressed, and however general or indefinite the failure indicated by them, (whether they be, "die without issue," or, "without having issue," or, "before having issue," or, "without leaving issue,") their force is always liable to be controlled, and their general import restrained, either by expressions incorporated into the limitation itself, or by any circumstances *dehors* or extrinsic to the gift, arising on the face of the instrument, in relation either to the land, or to the donee or devisee.

1. Charge of a sum of money, upon future

1. Among the circumstances to which this controlling or restraining force belongs, is that of a charge of a legacy, or

(i) See *Wyth v. Blackman*, 1 Ves. sr. 196; S C. Ambl. 555; where Lord Hardwicke construed the word, "children," in a deed to mean, "issue;"

it being associated with words which plainly showed, that more remote offspring were intended to be designated.

sum of money, to be paid to any person named in the instrument, by the person entitled under the Executory limitation, upon his future estate vesting in possession. The reason is, that such a charge intends a *personal* provision, and points to a *proximate event*, as the time of its taking effect (if at all) in favor of the person for whom it is made. It is argued, that if the donor or testator had in his view so remote an event as an indefinite failure of issue, he would scarcely think of making a pecuniary provision for persons *in esse*, the motive to provide for whom is entirely personal; and the improbability of such an intention in the author of the gift is regarded in the eye of the law, as of sufficient weight to counterbalance the ordinary legal construction, which also, in some measure, proceeds upon a presumed *intention*. The case which established (*k*) this doctrine, is that of *Doe d. Smith v. Webber*, (*l*) decided in B. R., during the time Lord *Ellenborough* was Chief Justice. The case was:—a

limitations
vesting in pos-
session.

Case of *Doe*
d. Smith v.
Webber.

(*k*) The case of *Nichols v. Hooper*, 1 P. Wms. 198, is not here cited or noticed as an authority, as, in a note contained in *Mr. Cox's* edition of those reports, it is stated, that the decision was afterwards reversed in the House of Lords: and see remarks on that case, 2 Pow. Dev. by Jarm. 576, 577. And the case of *Beauclerk v. Dormer*, 2 Atk. 308, also shows, that the case cited in the text was not the first in which the effect of a charge of money upon an ulterior devisee, after a dying without issue, was considered. There a testator bequeathed thus:—"M. D., I make my sole heir and executrix: if she dies without issue, then to go to G. B.; he to pay to D. B. 5000*l.* &c." Lord *Hardwicke* said:—"With regard to D. B.'s 5000*l.*, something plausible might be said, if this was to be construed as merely personal to her, and by way of provision as a portion, and not to arise unless D. B. survived M. D.;

for, then, indeed, a strong argument might be drawn from thence, to show the testator's meaning was, to confine the dying without issue of M. D. to the time of her death. But this being annexed by way of condition to the devise to G. B., makes it a vested legacy, and transmissible, though not payable till a future time, which takes away all the argument that might be raised from its being personal to her only; for a death before the contingency happens will not defeat the legacy." This opinion of Lord *Hardwicke* must have been delivered without due attention to the case of *Pinbury v. Elkin*, stated *infra*, sec. 3, which had been decided twenty-three years previously, and in which a bequest of a legacy, under similar circumstances to those of *Beauclerk v. Dormer*, was assigned as a reason for a restricted interpretation of words importing a failure of issue.

(*l*) 1 B. & Ald. 713.

testator devised to M. H. her heirs and assigns for ever, and in case M. H. should happen to die, and leave no child or children, then to J. B. and her heirs for ever, *paying the sum of 1000*l.* to the executor or executors of M. H., or, to such person as M. H. should by her will appoint.* It was held, that this was not the devise of an estate-tail to M. H., but of an estate in fee to M. H., with a good Executory devise to J. B., in case M. H. died leaving no issue at her death; it having been determined in the same case, that the words, "child or children," must be construed to mean, "issue." The grounds of this judgment are thus tersely stated by the Chief Justice:—"The payment of 1000*l.* being a personal provision, the event contemplated by the testator seems to have been a proximate, and not a remote, event, namely, an indefinite failure of issue, which might happen at any remote period." The next case bearing upon this point, though not so satisfactory an authority as that of *Doe v. Webber*, is yet worthy of notice, as being one of the very few furnished by our Reports, in which it has been considered or discussed. In *Doe d. King v. Frost*, (*m*) a testator, having a son and daughter, and the latter having several children, devised to his (the testator's) son, W. F., in fee, and if he should have no children, or child, or issue, the said estate was, *on the decease of W. F.*, to become the property of the heir-at-law, *subject to such legacies as W. F. might leave to the younger branches of the family.* It was adjudged by the Court of B. R., that W. F. took under this will an estate in fee, with an Executory devise-over to the person who, on the happening of the event contemplated by the will, should be the heir-at-law of the testator. In this case, it will be observed, that as independently of the charge of legacies upon the person entitled under the Executory limitation, that limitation itself was expressed to take effect *on the decease* of the person, in the event of whose

Case of *Doe d.*
King v. Frost.

(*m*) 3 B. & Ald. 546.

death without issue, the property was given over, less doubt could be entertained of the character of the failure of issue intended by the testator. As, however, the eventual charge of legacies was urged at the bar, in favor of the construction adopted by the Court, and referred to by the judges, without any exception being taken by them to the force attached to it in *Doe v. Webber*, the latter case may not improperly be considered as confirmed by the adjudication in *Doe v. Frost*.

In these two cases, it happened, that the sum of money to be paid by the devisee-over, was charged in favor of the nominee, legatee, or executor, of the first devisee. It should seem, however, that this doctrine does not depend upon any such connexion between the person in whose favor the charge is made, and the first taker; for it proceeds on the simple ground of a personal provision being intended. (n) The writer remembers a case, where the testator devised his lands to G. M. in fee, charged with legacies; and in case the devisee should depart this life without leaving any issue lawfully begotten, then the testator devised the property to W. W. in fee, "but subject and liable with the further payment of the sum of 800*l.*, as thereafter mentioned." The testator then proceeded to bequeath various other legacies to that amount, and directed them to be paid to the legatees, "within two years after the decease of the said G. M." The opinion of an eminent conveyancer upon this devise was, that by force of the gift of the 800*l.*, to be paid within two years after the decease of G. M., he took an estate in fee, subject to an Executory devise-over, in the event of his death without leaving issue living at that time.

It must be further noted, in reference to the cases of *Doe v. Webber*, and *Doe v. Frost*, that the fact of the sums charged not being necessarily raisable immediately after the

Not necessary that the charge be made in favor of first taker or his nominee or representative.

Nor that the sum be raisable immediately on future limitation vesting in possession.

(n) An inference of this kind may be drawn from *Howston v. Ives*, 2 Eden, 216. *Sed vide*, observations of

Rolfe, B., in *Doe d. Todd v. Duesbury*, 8 M. & W. 514, stated and observed upon, *infra*, pp. 207, 208.

Executory limitation vesting in possession, but, possibly, at a much remoter period, does not diminish the force of the charge, as restricting a dying without issue to a failure of issue at the death. For it is evident, that in the former case, under the will of M. H., the first taker, (and to whom the power of appointing the sum of 1000*l.* was given) the sum might not have been directed to be raised until the death of a person or persons *in esse*, or other period not too remote ; and in the latter case, the payment of the legacies which W. F. was empowered to leave to the younger members of the family, might have been also postponed for a period within the allowed limits. Nor, perhaps, *ought* this possible postponement of the payment of the sum charged, to be allowed any weight, if it be remembered, that it is equally open to the person in whom the power of appointment (or distribution or selection) is vested, to direct an *immediate* payment ; and that the *probability*, or, even, *possibility*, of such immediate payment must be considered to have been in the mind of the author of the gift, and to be, therefore, of equal force, as an evidence of his intention, with a *direction* for immediate payment.

Case of *Dunk*
v. *Fenner*.

Three cases remain to be noticed, upon the doctrine we have been considering, which may seem to lay it under very important restrictions. The first is that of *Dunk v. Fenner*, (o) where a testator gave the income of his real and personal estate, to his daughter for life, and at her decease, he gave unto her heirs, all his real and personal estate, to be equally divided among them, as tenants in common ; should his daughter have but one child, such child was to take the whole ; but if his daughter should *die without issue*, then, at her decease, the testator bequeathed *several legacies* to various persons, and proceeded to dispose of his real and personal estate thus :—" At my daughter's decease without issue, all my goods and effects of every kind shall be sold, and the said legacies paid, and a sum sufficient to produce

(o) 2 Russ. & My. 557.

150*l.* per annum invested; the interest to be paid to my said son-in-law for life: at my daughter's decease without issue, all my real estates shall be sold, unless their rents produce a sum equal to the interest of the money they would fetch, in which case they shall not be sold until after the decease of my brothers or sisters as hereinafter stated; all the residue of my personal estate, including that which arises from my real estates, should they be sold at my daughter's decease, shall be invested, and the produce be divided into four parts. Should my real estates remain unsold, then the interest arising from the personal estate, and all the rents of the real estate, shall be divided into four parts; and in either case, I give one-fourth to my brother, and one-fourth to each of my two sisters, to be paid to my said brother and sisters for life; and at the decease of either of them, such three parts shall be equally divided between the survivors and survivor for life." The testator then disposed of the remaining one-fourth, and also of the other three-fourths, and the capital producing the annuity, after the determination of the prior interests. The testator's daughter died without issue. It was held, that the daughter took an *estate-tail* in the freehold estates, with remainder to the trustees in trust to sell, and that she took the absolute interest in the personalty, and that the realty and personalty were to contribute equally to the *payment of the legacies and annuity*. This decision has been so justly and cogently observed upon by the learned author of a treatise on the construction of the class of limitations under consideration, that no better commentary will be attempted in this place. "The gifts over," observes Mr. *Prior*, (*p*) "were all dependent upon the event of the daughter dying without issue; the gifts of the real estate, and of the legacies and annuity, so far as they were charged upon the realty, were in any case valid: for if the failure of issue, on which they depended, was indefinite, they would take effect by way of remainder, after an estate-tail in the daughter:

Observations
upon *Dunk v.*
Fenster.

if the failure of issue referred to was such as would take place at a limited period, they would enure by way of Executory devise. The validity, however, of the gift of the personalty, and of the legacies and annuity, as far as they were charged upon it, depended entirely upon the construction to be given to the expression, 'dying without issue:' if an indefinite failure of issue were referred to, the gift must, in every event, be void; if a limited failure, it would be good. The decision, therefore, that the daughter took an estate-tail with remainders, in the real estate, that the gift-over of the *corpus* of the personalty was void, but that the legacies and annuity were well charged, not only on the realty, but also on the personalty, is necessarily a decision, that in the gifts of the real, and of the *corpus* of the personal estate, an indefinite failure of issue was referred to, but that the legacies and annuity were made to depend on a failure of issue at the daughter's death. There is some difficulty in making out the ground on which this double meaning was attributed to the 'dying without issue.' The first gift is of the legacies, and there the expression is, 'if she shall die without issue, then *at her decease* I give the legacies;' this, according to the cases before cited, was sufficient to restrict the failure of issue to the time of her death. The next limitation is, 'at my daughter's decease without issue, my goods and effects are to be sold, the *said* legacies paid, and a sum sufficient to produce an annuity invested.' The words, 'at my daughter's decease without issue,' would, probably, by themselves, mean, upon failure of her issue at any time, as they are only another form of the expression, 'when she shall die without issue;' but the direction, that the *said* legacies were then to be paid, which were before given *at the daughter's decease*, shows, that the testator was in this case also referring to the death of his daughter, as the time when the issue was to fail. The expression in the next sentence is the same,—'at my daughter's decease without issue, the real estates to be sold.' As this before referred to a failure of issue at the daughter's death, there is no

reason why it should not have the same meaning here; besides, the testator afterwards refers to the real estates being sold ‘*at his daughter’s death*,’ and in the same sentence as this expression, he gives his personal estate and the produce of his real estate. It would seem, therefore, that as in the gift of the legacies, the testator refers to a failure of issue at the daughter’s death, he does so equally in the latter clauses of the will; and the proper decision would appear to have been, that the daughter took the real and personal estate absolutely, subject to an Executory devise-over, on her dying without issue at the time of her death.”

These observations, it will be perceived, more immediately refer to the effect of the expression, “after the decease,” or the like, introduced into gifts on a failure of issue; a subject which will be presently noticed. But they fully prove, that the case is open to question, so far as it may effect the doctrine of a restricted failure, grounded on a charge of money; for, the more extravagant the decision as to the former point, the less weight can it possess upon the latter. But the most important circumstance is, that the effect of the charge of money was not even presented to the notice of the Court, and does not, therefore, appear to have at all attracted its attention.

The next case calling for special notice is that of *Doe d. Cape v. Walker*, (q) recently referred to, (r) where a testator, having bequeathed legacies to his son and daughter by a second marriage, and his granddaughter, M., the child of his second son by the first marriage, devised as follows:—“In case it should happen that my son W.” (who was the eldest, but to whom no express devise was made,) “should depart this life, and leaving no heirs lawfully begotten, and that my freehold messuage and tenement situate, &c., should fall by descent unto my granddaughter, M., and she inherit and possess the same, then I order and direct, and

*Case of Doe d.
Cape v. Walker.*

(q) 2 Scott, N. S. 317.

(r) *Vide supra*, p. 183.

my will is, that my granddaughter, M., shall pay or cause to be paid, out of my freshhold messuage aforesaid, the sum of 400*l.* of lawful money, viz., 200*l.* to my son, J., and 200*l.* unto my daughter, G.; the same to be paid within twelve months after she, my granddaughter, M., comes into possession of the said estate;" with a power for the two legatees to enter and sell the devised property, in case of default in payment of the sums given to them, at the time appointed. W. having died without issue, the property was claimed by the coheirresses of M., against a devisee under the will of W. The Court of C. B., as has been already stated, held, (to reverse the order in which its opinions were declared) that as the estate would have descended upon M., but for the devise made by W. in his lifetime, the reasonable construction of the testator's dispositions was, that he intended to direct, that if his heir-at-law should not exercise his power of disposing of the estate, in consequence of which the estate should descend, in the proper sense of the word, to M., she should out of the estate pay certain legacies; and that, therefore, there was no *gift* to M., in any event. This obviously, rendered it unnecessary, *expressly* to determine, whether, had there been a devise to M. in the words of the will, the heir would have taken an estate-tail, by reason of the failure of issue expressed being indefinite, or not. But the Court observed, that it appeared to be the necessary construction of the words of the devise, "that if my son W. should depart this life, &c.," that those words pointed to an indefinite failure of issue of his son, from which an estate-tail might be implied. Now, it will be observed, that the effect of the opinion entertained by the Court upon the point as to the existence of an express gift to the granddaughter, rendered it perfectly immaterial to those who claimed under her, whether the failure of issue of the son contemplated by the testator, was indefinite, or not; for even if it were deemed to be confined to the son's death, still, as there was no gift to the granddaughter, the happen-

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ing of the event would not give her, or those claiming under her, any title. And, further, it is to be remarked, that the construction of the heir taking an estate-tail, with remainder in fee to the granddaughter, was the only one pressed upon the consideration of the Court, although that, of the son taking a fee, with an Executory devise-over in case of failure of issue at his death, was slightly mentioned, and was also marked for argument. And, moreover, there was reason and policy in abstaining to insist upon the latter of the constructions; for, of the two, that, which went to limit and modify the estate of the heir (itself not arising by express gift) in general accordance with the contingency expressed, and to give effect to the intended direction, with respect to the granddaughter, upon the happening of that contingency, as upon the *natural determination* of the estate of the heir, was preferable to one, which implies a *forcible interruption* of an estate in fee, and which, on that account, seems to demand more form and explicitness in the expressions on which it is grounded.

The other case, alluded to, is that of *Doe d. Todd v. Duesbury*, (s) where a testatrix devised real and leasehold estates, to T. D. for life, and after his decease, unto all and every his child and children, his, her, or their heirs, executors, administrators, or assigns, equally to be divided between them, if more than one; but in case T. D. should happen to die without leaving lawful issue, then, to R. T., C. D., and M. D., their heirs, executors, administrators, and assigns, as tenants in common, *charged nevertheless with the payment of the legacy or sum of 1000*l.**, which the testator thereby, in that case, bequeathed to E. H.; the same to be paid to her at the end of twelve calendar months, next after the said R. T., C. D., and M. D., their heirs, executors, administrators, or assigns, should come into the possession of the devised property. All the children of T. D. died in

Case of *Doe d. Todd v. Duesbury*.

his lifetime, and he afterwards suffered a recovery to the use of himself in fee, and devised the property by his will. Two-third parts of the property being claimed by one of the ulterior devisees, in her own right, and also in right of another, whose heiress she was, against the person claiming under the will of T. D.,—it was argued, that the contingency, on which the limitation-over depended, was not too remote for an Executory devise, for that the charge of 1000*l.* in favor of E. H., indicating a benefit to a person then living, and to be realised within twelve months after the event, showed that the testatrix contemplated a proximate event. It was, however, further contended, that, under the gift-over, the children of T. D. took estates-tail, with a vested remainder to the ulterior devisees; in which case, the recovery of T. D. was equally inoperative. On the other hand, it was insisted, that the gift-over to R. T., C. D., and M. D., was clearly too remote to be valid as an Executory devise; the words, “die without leaving issue,” having never, in relation to freeholds, been held, *per se*, to refer to issue living at the death. The other construction urged was also opposed, as untenable. It was held by the Court of Exchequer, that the gift-over, by way of Executory devise, was void as being too remote. In reference to the argument, that the charge of the legacy was sufficient to cut down and narrow the ordinary construction of, “dying without leaving issue,” Rolfe, B., (who delivered the judgment of the Court,) made the following observations:—“The charge, it is said, is not a charge in favor of E. H. and her executor or administrator, but a gift personal to her, not payable unless she should be herself alive to receive it, and, therefore, it is contended, the failure of issue contemplated must have been a proximate, not a remote, event; a failure of issue at the death of T. D., not an indefinite failure of issue at some distant time. But we are of opinion, that the foundation on which this argument rests, wholly fails, inasmuch as there is nothing whatever to justify the inference, that the gift

was intended to be personal to E. H., and dependent on her being alive to receive it, when payable. A legacy to A., is the same thing as a legacy, to him *his executors and administrators*, and will be payable to them, whether they are named or not, unless there is something in the will, to point to a different construction. There is nothing of the sort in this will, for the mere circumstance, of the gift being a gift to take effect after a failure of issue, clearly can have no such effect. That is a circumstance always occurring in the very common case of a devise to sons in tail, and on failure of their issue, over to collateral relations, subject in such case, to pecuniary charges in favor of daughters. In such a case, the daughters may not be alive to take the benefit, but no one ever suggested it as a reason for construing the gift as personal to them, that it was made to take effect after a general failure of the issue of the sons. It would certainly go to the executors or administrators of the daughter, whether expressly named or not. The present case, therefore, is clearly distinguishable from that of *Doe d. Smith v. Webber*, on which the plaintiff placed so much reliance; for there, the party for whose benefit, or for the benefit of whose immediate nominee, the charge was to take effect, was herself the party, the failure of whose issue was in question, and the Court, on the whole context of the will, felt itself warranted in concluding, that the charge, which certainly was not to arise till after the failure of issue in question, was to arise (if at all) immediately on the death of the tenant for life; and the consequence necessarily was, that the failure of issue contemplated by the testator, was a failure of issue at the death of the tenant for life." The Court was, therefore, of opinion, that the gift-over was void as being to take effect after an indefinite failure of issue; and also gave judgment for the defendant on the other point raised.

Now, if it may be allowed to canvass the grounds on which the conclusion of the Court, upon the effect of the charge of the legacy, is reported to have been rested, it

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should seem, that their sufficiency is open to very grave objection. In the first place, it is never supposed, that, when a testator directs a sum of money to be paid by a person taking in the event of a failure of issue, he intends that, as *necessarily* a personal provision for the object of it, or, as it was said, "dependent on that object being alive to receive it, when payable": *primarily*, doubtless, the charge is so intended. It is not a question of actual *fact*, as to whether the legatee survives the specified event; but of *presumption* of intention, going to negative another construction, likewise proceeding on presumption. The argument, therefore, that the absence of words of representation does not necessarily imply a positive payment to the individual named, is of little weight, because a contrary argument is not necessary to support the construction contended for, *viz.*, that of a restricted failure of issue. For the same reasons, the instance of a charge of a sum of money after an *express* estate-tail, is not apposite: no presumption is admissible; and no opposing one is to be rebutted: the charge is postponed to an express estate-tail; and it will, doubtless, take effect, although the object of it die before the determination of the entail, and although there be no words of representation. Nor is it a legitimate consequence of the argument, that in a case of *doubtful construction*, an inference is derivable from the circumstance of a pecuniary benefit being intended for an individual, that when an *express estate-tail* is given, with a charge of a sum of money on its determination, such charge must be held to be dependent on the object of it living to the period of its taking effect; because no such necessity exists, or is contended for, in the former case. Nor is it easy to understand the distinction, between a charge in favor of the person, the failure of whose issue is in question, and a similar direction for payment of a sum of money to a stranger; when it is remembered, that the hypothesis assumes the previous death of the object of the legacy. (t)

(t) *Vide supra*, p. 199.

Moreover, in *Doe v. Webber*, (alluded to by the Court of Exchequer,) it has before been seen, the legacy was in favor of any person who should be appointed by the will of the first devisee; and such appointee might not have been "immediate," within the terms of Mr. Baron Rolfe's reference to that case.

But it deserves very serious consideration, whether *Doe d. Todd v. Duesbury* can be admitted as a case of very great authority upon the point under consideration; as it seems to be opposed to that numerous class of cases, which have established the general rule, that words importing a failure of issue following an express limitation to children, whether in fee or in tail, are to be construed as referring to the objects of the preceding gift, *viz.*, children, simply, and not to issue, generally. (u) Certain it is, that that rule has been frequently applied to limitations, "on all fours" with those in the case in question; (v) and it is unaccountable that it should have apparently escaped all notice in reference to that case. Perhaps, however, a reason is to be found in the probable circumstance, that the construction, alluded to, would not have served either of the litigating parties in *Doe v. Duesbury*; for, under it, the property would belong to the heirs-at-law of the several deceased children; which character could not have been filled by the parent; the deaths of the children having taken place prior to the commencement of the operation of the new law of inheritance. The only question which might have been raised in reference to this construction, is, whether the word, "leaving," did not refer to a failure of the objects of the preceding gift *at the death of the tenant for life*; a doctrine which is supported by the extra-judicial opinion of Lord Cottenham, in the case of *Tarbut v. Tarbut*; (w) and which, if sus-

(u) See these cases stated, 2 Jarm. 416, *Goodright v. Dunham*, Dougl. Wills, 372, *et seq.* And *vide infra*. 264, and *Tarbut v. Tarbut*, *infra*.

(v) *Ex gr.* the gifts in the cases of *Malcolm v. Taylor*, 2 Russ. & My. (w) Stated 2 Jarm. Wills, 375,

tainable, would have established the title of the person claiming under the limitation-over, in *Doe v. Duesbury*; all the children, in that case, having died before their parent, the tenant for life.

It remains to be seen, whether the decision here noticed, will be treated as having set aside the general rule alluded to: if not, the opinion of the Court, upon the point as to the effect of the charge of a sum of money upon words importing a failure of issue, cannot be entitled to the ordinary weight of an express authority. It may be observed, however, that the Court only adjudicated upon the propositions made by the plaintiff in the case in question, who must have succeeded upon the strength of his own title, and between whom and the defendant, no advantage could be taken of the rule referred to, nor its applicability maintained; except upon the doubtful effect of the word, "leaving," above mentioned.

Charge of money, of less importance in reference to gifts on failure of issue, when effect of construction of a general failure is to raise an estate-tail.

Having endeavoured to place in its true light, the effect of the decisions in the cases of *Dunk v. Fenner*, *Doe d. Cape v. Walker*, and *Doe d. Todd v. Duesbury*, upon the doctrine of construction, at present under consideration, it must remain for time to show, the exact extent to which they will be deemed to have put limits upon that doctrine, or how far they may have circumscribed the range of its operation. One general observation may, however, be made with respect to them, to the effect, that the circumstance of a legacy or other charge of a sum of money, in the event of the death of a person without issue, is entitled to less influence in determining the extent or character of the failure of issue contemplated, where the construction of an indefinite failure of issue would have the effect of raising an estate-tail in a prior taker, (which, of course, would validate the legacies or charges, and every other ulterior disposition affecting the property,) than where the application of such a construction would have the effect of rendering the money-

376; but see the observations of that learned gentleman in reference to such a doctrine, pp. 377, 378, of the same Treatise.

charge, and every other gift, void for remoteness, as not, by the rules of law, abridging or enlarging the prior estate into an estate-tail. (x) Of the former character, were the dispositions in *Dunk v. Fenner*, (as to the real estate) and *Doe d. Todd v. Duesbury*; and as to *Doe d. Cape v. Walker*, there was not, as has been already said, any express or necessarily implied gift, on failure of issue of the heir, which would be either assisted or invalidated by any construction to be put upon the words importing failure of issue: had there been such a gift, the case would have been embraced by the observation just made, and, as was intimated by the Court, an estate-tail would have been raised, by implication, in the heir, which would have prevented the intended legacies being void for remoteness.

In conclusion of this subject, it may be remarked, that the cases in which the effect of a charge of a sum of money, in the event of a limitation after a failure of issue taking effect, has been discussed, are confined to *wills*; there being, so far as the writer's knowledge extends, no reported decision upon the question, as applicable to similar limitations in deeds. Nor is it easy to predicate, what decision would be arrived at by a Court of law upon the point, should it ever call for judicial notice. On the one hand, the superior favor shown by our Courts of justice to the smallest manifestation of *intention* in a testator, the general inflexibility observed in the interpretation of instruments *inter vivos*, and the partiality of the law, for the construction of an indefinite, as opposed to a restricted, failure of issue, in regard to real estate, seem to point to a confinement of the doctrine in question to testamentary limitations; while, at the same time, the arbitrary character of the rule which prefers an indefinite failure of issue in limitations of real estate, the unreasonableness of applying it where a clear indication of a contrary intention exists, and the perfect applicability of

Restricting force of charge of money, hitherto confined to testamentary dispositions.

Arguments for and against extension of the doctrine to instruments *inter vivos*.

(x) 2 Pow. Dev. by Jarm. 576. See *vide*, ib. 583.

the grounds of the doctrine under consideration, as well to limitations in deeds, as to devises, lead to the conclusion, that the same rule would be abided by both in deeds and wills.

2. Circum-
stance of
limitation on
failure of issue
being of life-
estates solely.

2. Another circumstance which has been allowed to exercise a control over words, indicating, in their ordinary legal signification, an indefinite failure of issue, is that of the limitation-over, after a dying without issue, being of a *life-estate*, or *life-estates, only*; to which subject a distant allusion has before been made.^(y) In *Roe d. Sheers v. Jeffery*,^(z) a testator devised the premises in question to his wife for life; after her decease, to his daughter for life; after her decease, to his grandson and his heirs for ever; but in case his said grandson should depart this life and leave no issue, then the premises should be and return to the three daughters of W., and M., F., or the survivors or survivor of them, to be equally divided betwixt them, share and share alike. The question was, whether the grandson took an estate-tail, or an estate in fee, with an Executory devise-over. Lord *Kenyon*, on delivering the judgment of the Court of B. R., said, that on looking through the whole of the will, the Court “had no doubt, but that the testator meant the dying without issue to be confined to a failure of issue at the death of the first taker; *for the persons to whom the property was given over were then in existence, and life-estates were only given to them*: and it was, therefore, held, that the limitation-over took effect as a good Executory devise. The doctrine proceeds upon this:—That as a life-estate only is given over, the failure of issue intended must be presumed to be a failure, to happen, if at all, within the compass of that life; and that, therefore, as no other period for ascertaining the failure can be fixed, it means a dying without issue living at the death of the first taker. In the above case of *Doe v. Jefferys*, it will be seen, that as

(y) *Vide supra*, p. 195.

(z) 7 T. R. 589.

there were no words of limitation annexed to the gift of the three daughters, nor any other words which could have the force of passing the fee to them, they took life-estates only; and this circumstance of the life-estates being only *implied* in law, tends to give greater force to the rule, as applied to cases where they are *expressly* limited; though it may be questioned, whether it gives greater force to the argument. This doctrine is also sanctioned by the case of *Trafford v. Boehm*, (a) where A. limited 10,000*l.*, on failure of issue of the body of husband and wife, to B. in tail; and it was held, that the limitation to B. was void, as an Executory devise, being too remote; but that it was *otherwise, where the limitations-over were for life*, that confining it to a failure of issue during the lives in being.

But the doctrine, that where there is a limitation-over for life, upon the death of a person to whom a prior gift is made, without leaving issue, the failure of issue shall be construed to refer to the time of the death of the first taker, does not obtain, where *all* the limitations-over are not of estates for life *only*. (b) This was adjudged in the case of *Doe d. Jones v. Owens*, (c) in which there was a devise for life with remainder in fee, in the event of the death of a prior devisee in fee, without issue; and it was held, that the failure of issue intended was a general failure, and that, consequently, the

But doctrine does not apply, unless *all* ulterior gifts for life.

(a) 3 Atk. 449.

(b) The case of *Doe d. Lyde v. Lyde*, 1 T. R. 593, (1787,) favors, indeed, a different doctrine. There, a testator bequeathed a term to G. L. for life, and after his decease, to M., his wife, for life, and after the decease of the survivor, to the children of G. L., share and share alike, and if G. L. died without issue, then to R. L. for life, and after his decease, to M., his wife, for life, and after the decease of the survivor, to their children, in like manner, with the limitation to the children of G. L. The limitations to

R. L. and his wife were adjudged good: and *Buller, J.*, laid great stress upon the circumstance of the limitation to R. L. being for life only, as excluding the idea of an indefinite failure of issue. But the current of subsequent authority is clearly opposed to this notion; and the decision in *Doe v. Lyde*, as far as it may support such a doctrine, must be considered as overruled; although it is to be observed, that the case furnishes other grounds, upon which to rest the decision.

(c) 1 B. & Ad. 318.

first taker had an estate-tail. *Bayley*, B., observed :—" If life-estates only had been devised over, *Roe v. Jeffery* might have applied, and the terms, "die without issue," might have been confined to a failure of issue at *Benjamin's* (the prior devisee) death." In *Barlow v. Salter*, (d) also, it was decided, that the mere circumstance of the first of the limitations-over being of a life-estate only, would not, of itself, suffice to restrain words importing a general failure of issue, to mean a dying without issue at the death. Sir *Wm. Grant*, M. R., in the latter case, thus luminously stated the reasons of this distinction, and the general nature of the doctrine :—" When nothing but a life-interest is given over, the failure of issue must necessarily be intended a failure within the compass of that life ; but where the entire interest is given over, the mere circumstance, that one taker is confined to a life-interest, furnishes no indication of an intention to make the whole bequest depend upon the existence of that person, at the time when the event happens, on which the limitation-over is to take effect. When a remainder for life has been limited after an estate-tail, it never was argued, that an estate-tail could not really be meant to be given, because of the improbability of intending a personal provision for one person, after an indefinite failure of issue of another. The failure may happen during the life : and that chance is what is given to the remainder-man for life. So here, if *Catherine* (the devisee-over for life) shall be living when the issue fails, she will take a life-interest, but the bequest-over is still to take place, when the failure of issue shall happen, whether *Catherine* shall be then living, or not."

Rule proceeds
upon presumption
of intention.

This rule, it will be observed, like that relating to a charge of a sum of money on failure of issue, is grounded entirely upon the *presumed intention* of the author of the gift, and not upon any intrinsic force of the Executory limitation

(d) 17 Ves. 482. And see *Destouches v. Walker*, 2 Eden, 261.

itself; which, as being subsequent to the words describing the failure and determining the previous estate, cannot have any *direct* operation upon them. As an index to intention, the limitation of a life-estate after a dying without issue may, perhaps, be considered superior to a charge of a sum of money. (e) Such a limitation seems more clearly to refer to a proximate event; and it necessarily implies a personal provision, since the decease of the object of it, before the happening of the event on which it depends, prevents it from ever taking effect.

At the same time, it would not seem, that our Courts of Justice are at all disposed, to extend the doctrine; if they may not even be said, to evince a desire, to qualify and impose limits upon it. The cases of *Doe v. Owens*, and *Barlow v. Salter*, afford evidence of the former disposition; and the latter may be inferred from the general tone of the observations of Sir *Wm. Grant*, above cited, and the remark of Lord *Denman*, in a recent case, (f) that the decision in "*Roe d. Sheers v. Jeffery*, if supportable at all, can only be so on the ground of the devise-over being of life-estates."

Courts seem disinclined to extend favor to the doctrine.

Of a similar character, also, is the decision in the recent case of *Simmons v. Simmons*, (g) where there was a gift of real and personal estate, to the testator's daughter, A., for

(e) It is true, a learned writer has remarked,—“That the mere circumstance of the subsequent estates being for life only, should be made a ground for varying the construction, is certainly extraordinary, since it is every day's practice, to limit an estate for life in remainder after an estate-tail, which involves precisely the absurdity, which is here supposed to flow from the construction of an indefinite failure of issue.” See 2 Pow. Dev. by Jarm. 578. But, as has been before (*supra*, p. 208) observed, in reference to a charge of money, the argument, that gifts which are said to give rise to a

restricted construction may be limited after an express estate-tail, when they can be attended by no such effect, seems to imply a disregard of the essential character of the question under consideration, which is, whether the expressions or circumstances do not give rise to a *presumption*, sufficiently strong to rebut a construction itself grounded on *presumption*, although supported by antecedent inclination of law.

(f) *Doe d. Cadogan v. Ewart*, 7 Ad. & Ell. 660.

(g) 8 Sim. 22.

life; and at her decease, she to be at liberty to will the same to her issue; but in case of her dying without issue, to the testator's brother and sister, for their lives; in the event of the brother's death, prior to the death of the daughter, to the children of the brother. It was held, that A., took an estate-tail in the realty, and the absolute interest in the personalty. Here, it will be observed, that, except in the particular contingency of the brother dying before the daughter, life-interests only were limited-over.

The observations of Lord Brougham, also, in the recent case of *Lepins v. Ferrard*, (h) show, that his lordship's inclination was by no means favorable to the presumption of a restricted failure, from the limited extent of the gifts-over; although it is to be remarked, that those observations were entirely extra-judicial, as there was a gift-over of the *corpus* of the fund in question.

Whether the effect of the construction is to restrain failure of issue to death of ancestor, or of parties taking under limitation-over.

It does not seem to be clearly settled, in regard to these cases of restrictive construction of words, importing a failure of issue, on the ground of the limited extent of the ulterior interests, whether the default is to be considered as confined to the death of the *person whose issue is to fail*, or of the *persons taking the ulterior estates* for life. The writer ventures to think, that both principle and analogy lead to the conclusion, that the failure is restricted to the death of the first taker. The question in these cases is, between two different interpretations of certain phrases, (one, fixing the ancestor's death as the time of ascertaining the failure, and the other, leaving that time unlimited,) neither of which can be considered forced or arbitrary. But that construction is arbitrary, which has no immediate connexion with the person whose issue is to fail, and yet does not admit of an unlimited period for the ascertainment of the failure. Moreover, the influence of the circumstances and expressions

(h) 2 Russ. & My. 388, 389; but Sir John Leach, M R, when the case was before him, treated the doctrine

as settled and unobjectionable: see ib. 383.

which tend to rebut the construction of an indefinite failure of issue, is one of general *presumption* only, and is not directed to the attainment of a coincidence or mechanical aptitude (as it were) between the character and extent of the failure of issue contemplated, and the nature and time of actual taking effect of the estates dependent on that failure. Nay, more, an interpretation which, although proceeding only on *presumption*, should introduce the *death of a stranger*, as the limit within which to confine the happening of the failure of issue, would be an anomaly, not more irreconcilable with the nature of a presumptive construction, than unsustainable by the whole range of legal analogy, applicable to the class of limitations in question.

It must, however, be noted, that the reverse of the view here suggested, is that maintained by a learned writer upon the class of limitations under consideration, of some acuteness and research. (i) The only judicial *dicta* that appear to have been delivered upon the question, afford support to both views; for while there is a distant intimation on the part of Lord *Hardwicke*, (k) in the before cited case of *Trafford v. Boehm*, that the failure should be restricted to the *lives of the ulterior takers*; the circumstance of life-estates being limited upon a failure of issue was *expressly* urged by Lord *Kenyon*, (l) in *Roe d. Sheers v. Jeffery*, as restricting that failure *to the death of the first taker*. Sir *John Leach*, however, in the case of *Lepine v. Ferrard*, (m) seems to have considered, that the effect of the gift-over being for life only, was, to restrict the failure of issue to the death of the person taking under the ulterior gift; although the arguments, and the observations of Lord *Brougham*, on the appeal, (n) treat the doctrine as confining the failure, to the death of the first taker.

(i) See Prior on "Issue," 87.

(k) 2 Atk. 449.

(l) 7 T. R. 596. And see observations of the same learned judge, in

Wood v. Baron, 1 East, 259.

(m) 2 Russ. & My. 383, referred to, *supra*, p. 216.

(n) See 2 Russ. & My. 386—389.

3. Circum-
stance of gift-
over being to
survivors of a
class.

3. A further circumstance to which a restraining force has sometimes been attributed, in regard to the character or extent of a failure of issue, is that of the gift-over being to the *survivors or survivor* of a class of persons, on the death without issue of one or more of the members of the class. (*o*)

Ground on
which its
supposed effect
rests.

The argument for this restrictive operation of the ulterior gift proceeds, as in the instances before considered, upon the assumption of a *personal* benefit being intended for the survivors of the class; and that assumption, being inconsistent with the notion of an indefinite failure of issue, as the event on which the benefit is to have effect, is urged as a ground for restricting the failure of issue, to a dying without issue living at the death of the ancestor.

Insufficiency of
authority.

The writer is not aware of this doctrine being sanctioned by more than one decided case, so far as it respects limitations of *real estate*; and that adjudication is by no means satisfactory as an authority upon the point. The case in question is that of *Fisher v. Barry*, (*p*) adjudged in the Irish Court of Chancery, where a testator devised part of his realty, to his son, R., and his heirs, and the residue of his real estates, to his son, W., and his heirs: if R. died without issue, the testator gave all that was left to him, to W., *he paying his sisters, H. and J., 500*l*. each*: if W. died without issue, the testator gave all that was left to him, to R., *he paying H. and J. 500*l*. a-piece*: if both sons died without issue, then all that was left to them to go to the testator's daughters, as mentioned in the will. It was held, that the alternate gifts to R. and W., respectively, on failure of issue of the one first taking, were equivalent to cross-limitations in favor of the *survivor*, on either dying without issue, and *were, therefore, valid*. Now, this decision is, manifestly, open to the remark, that the construction adopted, though profess-
edly rested on the circumstance of the ulterior gift being made to the survivor, would have been equally and even more sus-

Case of *Fisher*
v. Barry.

Observations
upon *Fisher v.*
Barry.

(*o*) Prior on "Issue," 88, 89.

(*p*) 2 Hog. 153.

tainable, on the ground of the charge of money, to which that ulterior gift was in each case subject. And, it is conceived, it would have been more correct, so rested ; for to read a gift to one of two persons named, on the death of the other under particular circumstances, as necessarily implying the survivorship of the former, is certainly a violent construction, called for neither by any expressed intention, nor by necessary implication. It is, moreover, a doctrine not to be supported at the present day ; having been negatived in cases, much more strongly calling for the restricted construction. If the decision in *Fisher v. Barry* be sustainable, it should seem difficult, in *any* case, to invalidate cross-limitations between members of a class, (although named) on failure of issue of any of them, upon the ground of remoteness. Thus proving too much, the importance of the case in question as an authority upon gifts to *survivors*, on a failure of issue, must be estimated as but small ; and that, the more, as it is supported by no other adjudication as to gifts of realty.

In opposition to the construction adopted in *Fisher v. Barry*, are to be cited two cases, which, if of modern date, would be conclusive, against any restricted construction, in reference to limitations of realty, arising from the circumstance of the gift-over being to survivors. The first is that of *Chadock v. Cowley*, (g) where there was a devise of Blackacre and Whiteacre to M. for life, and after her death, Blackacre to B. and his heirs for ever, and Whiteacre to C. and his heirs for ever, and if either of them should die without issue, the survivor should be heir to the other ; and it was held, that each of the devisees in remainder took an estate-tail, with a vested remainder to the other, and that it was not a contingent limitation to the survivor, on the death of either without issue in the lifetime of the other ; which, it was said, would have been the construction, if the devise-over had been, if either of them died without issue, living

Authorities
opposed to the
restricted construction by
force of gift to
survivors.

Case of
Chadock v.
Cowley.

(g) Cro. Jac. 695.

The case of
Roe v. Scott
and *Smart*.

the other, on or before such an age. The other case is *Roe v. Scott* and *Smart*, (r) which is thus stated by Mr. *Fearne*:—A testator devised certain lands to his son *James*, to hold to him, his heirs and assigns for ever; and other lands, to his son *John*, to hold to him, his heirs and assigns for ever; and other lands, to his son *Thomas*, and to his heirs and assigns for ever; with this express condition, that his son *Thomas*, his heirs and assigns, should yearly pay to a granddaughter of the testator, the sum of 3*l.*, till her age of sixteen, and the testator charged the same premises with such payment; and he then added, that his will and mind was, that if either of his three sons *should depart this life without issue* of his or their bodies, then the estate or estates of such sons should go to the *survivors or survivor*: and if all his said three sons should happen to die without such issue, then he devised all the said premises, to his four daughters, and their heirs and assigns for ever. And he further charged the premises so as aforesaid by him devised to his said son *Thomas* and his heirs, with the sum of 40*l.*, to be by him or them paid to his said grandchild at its age of twenty-one years. The three sons survived the testator, and entered, and *John* died some time after, intestate and unmarried. And it was held, that the devise to *Thomas* did not give him the fee, but an *estate-tail*, which descended to his daughter, and upon her decease, without issue, the estate *went over to James, the then survivor* of the three brothers, and *not to the heirs of the said daughter*, to whom *James* was only related of the half-blood.

Extent of the
decisions in
Chadock v.
Cowley, and
Roe v. Scott
and *Smart*.

These cases must be considered as presenting serious obstacles to the restricted construction in question, for they are not opposed by any decisions more express and more satisfactory. At all events, they may, perhaps, be regarded as showing, that in the absence of any apparent intention, to make a personal provision for the survivors, and where

(r) F. C. R. 473, 474, n.

the word, "survivors," is used merely as a designation of a class who are take, rather than, of a number of individuals who are to succeed in their own persons, the Courts will not consider the circumstance of the gift being made to "the survivors" of a class, on failure of issue of one or more of the members of that class, as, of itself, sufficient to give a confined signification, to words primarily importing a general failure of issue.

It seems to have been assumed, in the latter of these cases, that the fee was given to the survivors; as, undoubtedly, it was, by force of the word, "estate," in the cross-limitation: but it seems clear, that had there been nothing in the devise, to give the survivors more than life-estates, nor any subsequent disposition carrying the whole interest, the dying without issue would have been restricted upon that ground, independently of any force of the word, "survivors." Nor should it seem, that this conclusion is affected by the circumstance of the life-estates arising merely by implication, from the want of proper words of limitation.

If gift to survivor for life only, restricted construction obtains.

The doctrine in question, does, indeed, so far as respects *personal* estate, seem to possess stronger claim to reception as a rule of law, as we shall see hereafter; but all the authorities bearing upon it (with the one exception above noticed) are strictly *confined* to limitations of personalty. However, this fact cannot be deemed *conclusive* against its applicability to limitations of real estate; because, in none of the cases has any such supposed distinction been noticed or referred to; but, on the contrary, upon two or three occasions, the question has been argued, both on the one side and on the other, without reference to the nature of the subject-matter of the limitations.

Doctrine better founded in regard to limitations of personalty.

In ordinary practice, the writer believes, the word, "survivors," in regard to limitations of real estate, is generally construed to mean, "others;" (*s*) which latter word, it is evident, does not indicate individual and personal enjoy-

"Survivors" ordinarily construed "others."

(*s*) See *Cursham v. Newland*, 2 Beav. 145.

ment in the person named in the gift-over, to the same extent, as the word, "survivors." If we suppose a devise to two persons and their heirs, with a gift-over to the "other," in the event of the death of either, without issue; it is manifest, at once, that the interest of the devisee-over is not intended to be, necessarily, or even, primarily, accompanied by actual possession and enjoyment. And, immediately, the presumption of a personal provision for the ulterior devisee is repelled, whether by any circumstance extrinsic to the limitations, or by the legal interpretation of those limitations themselves, the words, importing a failure of issue, retain their primary and uncontrolled signification, viz., dying without issue, generally, or indefinitely. And this construction of, "survivors," to mean, "others," is adopted, because the former term is too vague and general, to warrant the legal presumption of a personal provision being intended, and, at the same time, too particular in its ordinary signification, to admit of its proper meaning being sacrificed to legal strictness. By holding it to mean, "others," the appropriate force of the word, in common usage, is left unassailed, and the extended signification rests upon the assumed use of the substituted word; while, at the same time, as the word, "survivors," does not, necessarily, infer, a survivorship of *the first taker*, (the only event, in reference to which survivorship can be of any importance, as to the construction of the gifts under consideration,) but may, without the application of a forced construction, be well enough supposed to mean an outliving of *the failure of issue*, generally, a term is substituted of a less restrictive import, and not implying a survivorship of a person or event, of any description. As before observed, however, this legal interpretation of the word, "survivors," as applicable to limitations of real estate, rests upon general professional opinion, rather than on express judicial authority: although there are not wanting *dicta*, which seem to give it sanction.

After what has been expressed in regard to the force of the word, "survivors," in the construction of Executory gifts upon a dying without issue, it need hardly be observed, that where words of limitation or representation (as, "heirs," or, "heirs and assigns,") are superadded, there is no possible pretence for attributing to it, any greater force than belongs to a future limitation after a failure of issue, to a person, *by name*, and his heirs; in which case, the general import of the words, indicating the failure, is, of course, uncontrolled.

The effect of words of representation being added to the gift to "survivors."

But, notwithstanding there seems great ground for contending, that no restrictive presumption arises in regard to limitations of realty, from the fact of the gift-over being to the survivors or survivor of a number of persons, of whom the first taker is one, yet terms *more strict and confined*, though of similar signification, will have the effect of controlling a failure of issue, to a dying without issue living at the death. For example, we may suppose, a devise to A., B., and C., and their heirs, as tenants in common, with a proviso, "that in the event of the death of one or more of them without issue, then his or their share or shares shall go to such of them, the said A., B., and C., as shall survive the person or persons so dying without issue." Here, the devisees-over are described in intelligible terms, and their *personal* survivorship of the period at which the shares are to go over, clearly pointed out; and there being no indefiniteness in person or event, there is no opening for the substitution of terms, of less precise or more extended signification, which we have seen to be necessary, when the word, "survivors," is used. In such a case, therefore, the failure of issue is (it should seem) *restricted to the death* of each of the first takers, because the gift-over manifests an intention, that the interest of the ulterior devisees should be accompanied by actual possession; which intention is inconsistent with the notion of a general or indefinite failure of issue.

Effect of words, more strict and confined than "survivors," though of similar signification.

4. Circum-
stance of
ulterior gift
being to a
person, or the
members of a
class, "if then
living," or, "as
shall be living."

4. Similar to the foregoing grounds of the restricted construction of a dying without issue, is another, which has sometimes been considered sufficient to control the indefiniteness of the event, and which consists in the superaddition of some qualification to the ulterior gift, whereby it is necessarily prevented from taking effect, except during a limited period, not such as to violate the Rule against Perpetuities. (t) Thus, suppose land be given to A., and in the event of his death without issue, to B. in fee, *if then living*, or to *such* members of a class of persons *as shall be then living*,—the qualification annexed to the limitation-over, renders it necessary, that that limitation should take effect during the life of a person or persons *in esse*, or not at all; and this necessary qualification is considered incompatible with the construction of an indefinite failure of issue.

Want of actual
decision in
favor of
restricted
construction
from this
circumstance.

But supported
by analogy to
rule respecting
gift-over of
life-estates.

There is the same absence of positive decision in favor of this class of restrictive circumstances, as respects limitations of real estate, that we had occasion to remark, in regard to the class last considered: nor can it be predicated with certainty, that the terms of the doctrine would meet with judicial approval. There seems, however, to be a very just analogy between gifts to persons *in esse*, made *dependent on their existence* at the time of the happening of the contingency in question, and gifts of *life-interests* solely, to persons in being, after the death of the first taker without issue, as they, respectively, imply or require the existence of persons *in esse*, when the event happens, and, therefore, alike point to a *personal* provision for the ulterior takers. (u) Whatever the force, consequently, of the circumstance of life-estates only being limited after a failure of issue, upon the construction to be put upon that failure, there seems to be little doubt, that, upon principle, it must equally attach to a gift to persons *in esse*,

(t) 2 Pow. Dev. by Jarm. 574,
584. Prior on "Issue," 84, 85.

(u) See 2 Pow. Dev. by Jarm. 584.

upon a dying without issue, which requires the existence of the object of it at the time of the future estate vesting.

It is absolutely necessary, in order to warrant the restricted construction, upon the ground now under notice, that the objects of the ulterior gift should all be *in esse* at the date of the will creating the limitations, and that the original frame of the gift should be such as to exclude all possibility of after-born persons becoming entitled under it; (v) for it is obvious, that if objects of the latter description may take under the future limitation, the restriction, “if they shall be then living,” affords no guarantee whatever against the violation of legal limits, notwithstanding the intention, that the failure of issue should happen in the lifetime of the parties taking under the gift.

Objects of future gift must be *in esse* at creation of limitations.

Again, it must be clear, that the qualification as to the existence of the objects of the ulterior gift, has reference to the time at which *their interests are to vest in possession*; for it may sometimes, (not inconsistently with presumable intention) be construed to refer to the period, when the number and description of the *objects* of the ulterior limitation are to be ascertained, and not to the period of actual division among them. *Ex gr.*, in the case of a gift to A. for life, with a limitation in the event of his death without issue, to such members of a class of persons, *as shall be living at the decease of A.*; the question arises, whether the existence of the persons named, has any further or other connexion with their title under the ulterior gift, than that which arises from the necessity of their *surviving the first taker*; or whether the survivorship contemplated be also that, of the period at which the future interests are to become vested in possession. It seems to have been recently held, in the case of a similar gift of personality, (w) that the limitation-over did not require the existence of the objects of it at the time of the actual division of their interests, and that, therefore, the failure was

Contingency of ulterior takers being living, must clearly refer to the time of their interests vesting in possession.

(v) See Prior on “Issue,” 85.

& Coll. N. S. 494, stated *infra*.

(w) See *Garratt v. Cockerell*, 1 You.

not restricted to the death of the first taker, by force of the qualification superadded to the ulterior gift.

Necessary also that the word "then," &c., refer to death of ancestor, and not to event of failure of issue.

This construction, further, necessarily implies, that the word, "then," in any given case, relates to the period of *the death of the first taker*, as the time at which the contingency of a failure of issue will be ascertained; for if they merely form an expression of reference to the time, *whether at or whenever after the death*, the issue shall fail, (x) it is obvious, they have no force whatever in favor of a restricted construction. Any argument, derived from the words in question under such circumstances, would be, simply, a *petitio principii*. Thus, in one case, (y) the construction of an indefinite failure obtained, where there was a devise on a dying without issue, to the testator's grandchildren, *living at the time of the failure of issue*.

Limitation to A. and his heirs, and if he die without issue, living B., to B.

Resembling the class of cases here noticed, is a gift to A. and his heirs, and in the event of his death without issue, living B., to B. In such a case, the failure of issue is held to be restricted to the death of B.; and the ulterior limitation will, therefore, take effect, in case of the failure happening during his life. This was the effect of the decision in the before-cited case of *Pells v. Brown*, where the gifts were similar to those just illustrated. (z)

Observations on the legal construction of such gifts.

This construction has always been considered a forced one, and irreconcilable with strict legal principles. (a) Indeed, it seems difficult to conceive, upon what ground the words, "living B.," can be construed to mean more than, that if he be living at the time of the failure of A.'s issue, he shall succeed to the property; although, probably, even this latter interpretation would subject the failure to a restricted construction, upon the rule above considered. The

(x) 1 You. & Coll. N. S. 507.

(y) *Wright v. Pearson*, 1 Eden, 119; Ambl. 358. And see the cases in reference to gifts of personality, *infra*. *Sed vide, è contrà*, 4

Russ. 421.

(z) And see judgment in *Chadock v. Cowley*, Cro. Jac. 695.

(a) See 1 Pow. Dev. by Jarm. 188 n.; 2 ib. 574.

truth is, however, that in regard to both cases, the proper and sound legal construction would have been, to hold the failure of issue *unrestricted*; and thereby to raise an estate-tail, with an expectant remainder, *contingent* upon the happening of the collateral contingency superadded to the dying without issue. (b)

A question seems to exist in reference to the classes of gifts under consideration, whether the operation of the qualification superadded to the gift-over be, really and strictly, to confine the failure of issue to the death of the ancestor; or whether, on the other hand, the proper construction be not, that the dying without issue means a *general* failure of issue *within the prescribed period*. (c)

The question, whether the failure is restricted to death of first taker, or to that of person taking under the ulterior gift.

The writer has before (d) hinted his view of the somewhat similar question, arising on gifts-over of life-estates; and he ventures to think, that in regard also to gifts of the description at present under notice, the proper rule is, that the failure of issue is restricted to the death of the ancestor, and *that*, on the ground already urged. This certainly seems to have been the opinion of the Court, in *Pells v. Brown*; although it is true, it was not necessary to decide the question. And in the recent case of *Garratt v. Cockerell*, above referred to, and hereafter more fully stated, it is observable, that throughout the whole of the V. C. *Knight Bruce's* able reasoning on the case, he treated it as clear, that the only possible construction, alternative to that of an indefinite failure of issue, was, that the testator, by dying without issue, meant a failure of issue *living at the respective deaths of the first takers*, or living at the death of the survivor of them. What, it may be asked, is commonly understood by the phrase, "restricted (or restrictive) construction"? Is it not, a construction which is broadly distinguished from an indefinite interpretation, by not exceeding the intelligible boundary of the death of the ancestor? And

(b) See 1 Pow. Dev. by Jarm. 188 n.; *et infra*. p. 228.

(c) 1 Pow. Dev. by Jarm. 189.

(d) *Vide supra*, p. 216, 217.

can any construction not limited to the ancestor's decease, but partly indefinite, be termed, "restricted?" And where will be the limit, short of the period of perpetuity, to this inroad upon the peculiar feature and province of the indefinite construction?

5. Circum-
stance of
failure of issue
being combined
with contin-
gency per-
sonal to an-
cestor.

Limitation-
over on death
in minority,
and without
issue.

5. Another circumstance, which has the effect of restricting words, importing a failure of issue, to a dying without issue living at the death of the ancestor, is that, of their being associated with a collateral contingency having reference to the *age* of, or otherwise *personal* to, the ancestor. (e)

Thus, whenever property is limited to a person, and in the event of his dying under the age of twenty-one, without issue, or, under twenty-one *and* without issue; there can be no question, that the failure of issue intended, is a failure coincident only with the non-age of the party referred to; and such intended coincidence the law construes to be inconsistent with the construction of an indefinite failure of issue. But this supposed coincidence extends no further than to show, that the Executory limitation is to be dependent on the happening of a collateral event, superadded to the dying without issue; for *strict principle* and *analogy* would seem to require the construction of an *indefinite* failure of issue, and a *contingent remainder*, expectant on the *estate-tail*, which would be thereby raised, to take effect in the event of the failure of issue happening *within the specified age*. (f) It is, however, undeniably established, that whenever the failure of issue in question is combined with a further contingency, having reference to the death of the ancestor under a specified age, the failure is *restricted* to that ancestor's death.

Limitation-
over on death
above particular

So, again, it seems, that the confined signification will obtain, whenever a particular age is mentioned in connexion

(e) 1 Pow. Dev. by Jarm. 187, 188; 2 ib. 573, 574. Prior on "Issue," 72, 73.

(f) See the conclusive reasoning

of Mr. Jarman on this point, in 1 Pow. Dev. 188, 189, n. *Vide supra*, p. 227.

with the limitation on failure of issue, although the failure be not restricted to happen *under* that age, but expressly refer to a *subsequent* period. (g) Thus, where (h) real estate was devised to trustees, upon certain trusts for the benefit of the testator's son and daughter, until the son should attain twenty-one, or the daughter should marry; when the son should attain twenty-one, or the daughter marry, then upon trust to raise a sum of money for the daughter, and subject thereto, in trust for the son until twenty-one; and when the son should attain twenty-one, in trust for him and his heirs; but in case the son should not live to attain twenty-one, and the daughter should be living at the time of the decease of the son, *or in case the son should attain twenty-one, but should afterwards die without leaving lawful issue*, then, in trust for the daughter for life, with remainders-over; and the son attained twenty-one: the Court of C. B., on a case sent from Chancery, certified, that the son took an estate in fee-simple, subject to an Executory devise-over, in case of his dying without having issue *living at his death*. In these cases, the strong inference is, that as death under a particular age has been previously mentioned, and a further contingency is added, having reference to the *subsequent* death of the same person, a restricted failure of issue was intended; that being the best method of giving full effect to the implied restraint as to the period at which the dying without issue is to take place. (i)

age, and
without issue.

Ground of
construction in
latter case.

Upon the like principle, if the contingency associated with that of the failure of issue, be, the death of the ancestor *unmarried*, the restricted construction will obtain. (k) Thus, where (l) a testator devised leaseholds to trustees, in trust

Limitation on
death un-
married, and
without issue.

(g) 2 Pow. Dev. by Jarm. 573. Prior on "Issue," 72.

(h) *Glover v. Monkhouse*, 3 Bing. 13.

(i) Prior on "Issue," 73.

(k) 2 Pow. Dev. by Jarm. 574.

(l) *Wilson v. Bayly*, 3 Bro. P. C.

Toml. edit. 195. And see also *Hepworth v. Taylor*, 1 Cox, 112; *Maberly v. Stode*, 3 Ves. 450; *Doe d. Everett v. Cooke*, 7 East, 269; *Doe d. Baldwin v. Rawding*, 2 B. & Ald. 441. In the two latter cases, however, the restricted construction might be re-

for his son J., until his marriage, and then to make provision for his wife ; and if J. should have any issue, then to assign the premises to him, to enable him to make provision for his children ; and if J. should happen to have no issue lawfully begotten, in trust for the testator's son, M., in like manner ; it being his intention, that if J. should die before he was married, or *if he were married, and should have no issue* lawfully begotten, then the lands should be enjoyed by M. ; and in case both his sons, M. and J., should happen to die *unmarried, and neither of them should have any issue* lawfully begotten, over ; M. died unmarried ; J. married, but had no issue : and it was held, that the devise-over took effect, the words introducing that gift being construed in the disjunctive.

Limitation-over, on "not settling the estate" and without issue.

So, again, in one case, where (m) a testator devised to A. and his heirs, but if he died *without settling or disposing of the property*, or *without issue*, then over ; Lord *Kenyon* seems to have thought, that the failure of issue intended was a failure in the lifetime of A., and that the Executory devise would have been good ; but it was not necessary to decide the question.

But no restrictive construction arises from association of contingencies of latter kind, at this day.

At the present day, however, any inference in favor of a restricted construction, from circumstances such as those in the case last mentioned, seems, at least, open to question. For it is clearly settled, that a gift to take effect in the event of a person not exercising the power of disposition, incident to the property or ownership which the testator or donor has vested in him, is void ; (n) and, if such a contingency cannot properly be contemplated, it is difficult to conceive, what influence the mention of it can have on words importing a failure of issue ; which ought, in that case, to be read,

ferred to the collateral contingency of the first taker dying in his minority, and not alone to the force of the association with the word, "unmarried."

(m) *Beachcroft v. Broome*, 4 T. R. 441, *vide infra*, p. 233.

(n) *Grey v. Montagu*, 2 Eden, 205 ; 3 Bro. P. C. 314. *Ross v. Ross*, 1 Jac. & W. 145. *Cuthbert v. Purrier*, Jac. 415. *Bradley v. Paisoto*, 3 Ves. 324.

independently of such void collateral contingency. Moreover, in a very recent case, (*o*) where there was a bequest of leasehold property to the testator's son, R. ; "and should he die without heir or will," over, it was held by Sir *J. Wigram*, V. C., that R. took the absolute interest, the gift-over on the contingency of the legatee not making a will being held void. And it is observable, that this decision was pronounced, although it had been argued at the bar, that the construction of an indefinite failure of issue was repelled by the circumstance, (amongst others) that the existence of the heir or of the will must be contemporaneously ascertained ; meaning, at the death of the first taker. It is true, in *Green v. Harvey*, the property in question was personalty, but in regard to the particular species of disposition referred to, that circumstance is of no importance ; or, if any, favors the restricted construction.

In connexion with this subject, must be noticed a very important rule of construction, by means of which, the doctrine, that by the combination of a failure of issue with words referring to the death of the ancestor under a particular age, the failure is restricted, is practically carried out to a great extent. It is, that whenever there is a gift to a person in fee, and in the event of his dying under the age of twenty-one, (and, it should seem, any other or greater age,) *or* without issue, over ; the word *or* shall be construed to mean *and* ; and that, therefore, the limitation-over shall not take effect unless *both* the specified events happen. (*p*) The principle and operation of this rule is thus luminously stated by the author of the *Treatise on Wills* : (*q*)—"The ground for changing the testator's expression in these cases is, that as, by making the event of the devisee leaving issue, a condition of his retaining the estate, he evidently intends, that a benefit shall accrue to such issue through their parent,

The rule which construes "*or*" to mean "*and*" in gifts of this class.

Its principle and operation.

(*o*) *Green v. Harvey*, 1 Hare, 428.

Doe d. Herbert v. Selby, 2 B. & C.

(*p*) *Soule v. Gerrard*, Cro. Eliz.

926. *Miles v. Dyer*, 5 Sim. 435 ;

525. *Right v. Day*, 16 East, 67.

8 Sim. 330.

Eastman v. Baker, 1 Taunt. 174.

(*q*) Pp. 444, 445.

it is highly improbable, that he should mean this benefit to depend upon the contingency of the devisee attaining majority; while, on the other hand, it is very probable, that the testator should intend, in the event of the devisee dying under that age leaving issue, to give him an estate which would devolve upon the issue; but that, if he attained twenty-one, (the age at which he would acquire a disposing competency,) he should take the estate absolutely, *i. e.* whether he afterwards died leaving issue, or not. The change of *or* into *and*, therefore, substitutes a reasonable for a most unreasonable scheme of disposition." Again,—“the principle in question applies to every case, where the gift-over is to arise in the event of the preceding devisee or legatee dying under prescribed circumstances, *or* leaving an object who would, or, at least, who *might* take a benefit derivatively through the devisee or legatee, if his interest remained undivested, and to whom, therefore, it is probable, the testator intended directly a benefit, not dependent upon the circumstance of the devisee or legatee dying under the prescribed circumstances, or not.” And the same learned writer states the principle, upon which the doctrine rests, to be, shortly,—“that where the dying under twenty-one is associated with the event of the devisee leaving an object, who would, if the devisee retained the estate, take an interest derivatively through him, the copulative construction prevails.”

Limitation on death of B. in life of A., *or* without issue.

And this alteration of, “*or*”, into, “*and*,” obtains, also, in the case of a limitation to a person in fee, subject to a gift-over, if he shall die *in the lifetime of another, OR without issue.* (r) Thus, where (s) there was a devise to A. for life, with remainder to B. and her heirs, but *if B. died before A., or if she died without heirs of her body*, then to C. and his heirs; it was held, that the devise-over to C. could only

(r) 1 Jarm. Wills, 446.

2 East, 366. And see *Wright d.*

(s) *Denn d. Wilkins v. Kemys,*

Burrill v. Kemp, 3 T. R. 470.

take effect, if B. died before A., *and* without issue, for that unless *or* were read as *and*, the devisee-over would take if B. died before A., although B. left issue; and that would clearly be against the apparent intent of the devisor, which was, to prefer the issue of B. to C.

Again, the construction in question has been admitted in the before-mentioned case, (t) of a devise of estates to A. and his heirs, but if he should die *without settling or disposing* of the same, *or* without issue, then, over; in regard to which, it was held by the Court of B. R., that the devisee-over failed on A.'s disposing of the property, although he subsequently died without issue.

Limitation on death "without settling the estate," or without issue.

And so, also, the same rule was acted upon in a recent case, where (u) there was a devise to trustees, to the use of the testator's son, if he should attain twenty-three, or should be married with the consent of the trustees, which should first happen, in fee; and in case he *should die without attaining twenty-three, or, being married with such consent as aforesaid, should die without leaving lawful issue*, or such issue should die under twenty-one, then, over; the son married with consent under twenty-three: and it was held, that the son could make a good title to an estate in fee-simple.

Limitation on death under twenty-three, or being married with consent, without issue.

It is observable, that this constructive change of, "or," into, "and," and also the rule which gives a restricted construction to words importing a failure of issue, by reason of their association with a collateral contingency personal to the ancestor, obtain, as well in cases, where the construction of an indefinite failure of issue would have the effect of raising an estate-tail by implication, which would validate the subsequent gifts, as where that construction, on account of its not so operating, would, simply, render the ulterior limitations void for remoteness.

Rule restricting failure on ground of association with collateral contingencies, and that, changing "or" into "and," obtain, though contrary construction would raise estate-tail.

(t) *Beachcroft v. Broome*, 4 T. R. 441. And see also *Green v. Harvey*, 1 Hare, 428, as to personal estate. (u) *Grimshaw v. Pickup*, reported in 3 Jur. 286.

6. Circum-
stance of gift-
over being
introduced by
words—"after
his decease,"
or the like.

6. The next ground of a restrictive construction of words importing a failure of issue, to be mentioned in this place, is that founded on expressions by which the ulterior limitation is introduced, and which refer to the time of the decease of the ancestor, as the period of that limitation taking effect. Thus, if land be devised to A. in fee, and if he die without issue, then, *at or after his decease*, to B.; the words, "after his decease," seem, with sufficient certainty, to point to the death of the first taker, as the time at which the failure of issue contemplated is to be ascertained.

No actual
decision has
admitted force
of these ex-
pressions as
to limitations
of realty.

But, though, antecedently to any view drawn from authority, the influence of these words seems sufficient to warrant the restricted construction, it must be confessed, that no actual decision has yet admitted that influence, in regard to limitations of real estate; while there is some authority of a contrary tendency. Various cases have fully established the force of the words in question as respects gifts of personalty; but the broad distinction between limitations of real and of personal estate, upon a dying without issue, prevents those cases being regarded as decisive of the question before us. From two cases only, can a conclusion favorable to the extension of the doctrine under consideration to limitations of real estate, be derived. The case, alluded to, is that of *Doe*

Case of *Doe* d.
King v. Frost.

d. *King v. Frost*, (v) where there was a devise of realty to the testator's son, W. F., and his heirs, provided, that if the said W. F. should have no children, child, or issue, the devised property was, *on the decease of the said W. F.*, to become the property of the heir-at-law, *subject to such legacies* as W. F. might leave by will, to any of the younger branches of the family. It was held, that W. F. took an estate in fee, subject to an Executory devise-over, in the event of his death, without leaving issue living at that time. It has been before seen, that this decision is, in a great degree, to be referred to the circumstance of the charge of legacies,

Observations
upon *Doe* d.
King v. Frost.

subject to which the ulterior limitation was made. But it is clear, that the words, "on the decease," by which the gift-over was introduced, must be considered as having, in some measure, influenced the decision, for *Holroyd, J.*, referred to that expression, as of some importance in putting a construction upon the limitations. The case cannot, however, be treated as even approaching to a *decision* upon the effect of the words in question; for it does not appear, that they were urged in the argument at the bar, or by the other judges, as warranting the limited construction adopted by the Court.

The other case, referred to, is that of *Robinson v. Gray* (w) where there was a devise to a trustee, in trust to pay the rents and profits, to the testatrix's three daughters, and the survivor of them, for their respective lives, share and share alike; and after their decease, the property to be in trust for the children of the said three daughters, who should be living at the death of the survivor of the said daughters, share and share alike, as tenants in common (without any words of limitation): but if all the said daughters should die without leaving issue, *then after the decease of the survivor of the said daughters*, in trust for the testatrix's grandson, W. R., his heirs and assigns for ever. On a case from Chancery, the Court of B. R. certified, that the testatrix's daughters took estates for their lives, and that such of their children, as should be living at the death of the survivor of the daughters, would take estates in *fee*, as tenants in common. To have arrived at this conclusion, it is evident, that the judges must have discarded the construction of an indefinite failure of issue, for the application of such a construction would have had the effect of raising estates-tail by implication in the testator's daughters, in remainder expectant on the determination of the life-estates of their children. A *restricted* construction, on the other hand, operated in this manner:—the testator, by giving over the property in fee, in the event

Case of *Robinson v. Gray*.

Observations upon *Robinson v. Gray*.

(w) 9 East, 1.

of a default of children of his daughters, living at the time of the decease of the survivor of those daughters, plainly implied, that if any grandchildren outlived the survivor of the daughters, such grandchildren should take the fee; as the construction of their taking only life-interests would make it perfectly immaterial, at what period their deceases should take place, and would, therefore, render nugatory any provision, contemplating the deaths of the daughters' children under particular circumstances; reasoning similar to that, which gives the fee to a person under a devise to him indefinitely, with a subsequent limitation-over, in the event of his death under twenty-one, or other specified age. To give full effect, consequently, to the limitation on the contingency of a failure of the testator's grandchildren, the Court, having determined upon the construction of a restricted failure, would give effect to that construction, by holding the grandchildren living at the decease of the survivor of the daughters, entitled in fee-simple; which was the decision actually pronounced. This, it is conceived, is the true character of the adjudication referred to; (x) and it has been here considered, for the purpose of showing, that *Robinson v. Grey* must be regarded as an authority in favor of the restricted failure of issue; but whether, or to what extent, that construction is to be referred to the words, "after the decease, &c.," introducing the ulterior gift, it may be difficult to say.

Case of *Walter v. Drew*.

Opposed to these two authorities, are two others, of the following description. In *Walter v. Drew*, (y) a testator devised, that if W., his eldest son and heir-at-law, should happen to die, and leave no issue of his body lawfully begotten, then and in that case, and not otherwise, *after the death* of the said W., the testator's lands of inheritance should be to R. in fee: and it was held, that W. took an estate-tail; of course, upon the ground of the failure being

(x) See the arguments in *Hutchinson v. Stephens*, 1 Keen, 244, 245,

as to the nature of this decision.

(y) 1 Com. 373.

unrestricted. In *Doe d. Cock v. Cooper*, (z) there was a devise of lands, to the testator's nephew, R. C., for his life, and after his decease, to the lawful issue of the said R. C., as tenants in common; but in case the said R. C. should die without leaving lawful issue, *then, after his decease*, to G. H. in fee: and it was held in B. R., that R. C. took an estate-tail, to accomplish the general intention, and by implication from the words, "in case R. C. shall die without leaving issue."

Case of *Doe d. Cock v. Cooper*.

In neither of these last-mentioned cases does it appear, that the question of the force of the words referring to the decease of the ancestor, in the gift-over, was at all presented to the notice of the judges. In the latter of the two, indeed, the construction of an estate-tail in the first taker obtained, independently of the limitation on failure of his issue; although that gift was urged in favor of his taking an estate-tail. The only effect, therefore, of a limited interpretation of the words importing failure of issue, would have been, to give place to the ulterior limitation as a remainder, *contingent* on the event of the death of the tenant in tail, without issue *living at that time*; and, as has been properly said, (a) it could hardly be contended, that the words, "after his decease," sufficed for that purpose; especially, as the indefinite construction would have the advantage of making the ulterior limitation a remainder, to arise on the determination of the preceding estate-tail at *any* time. It must be admitted, therefore, that *Doe d. Cock v. Cooper* forms no very important authority against the restrictive construction under consideration; although, as supported by *Walter v. Drew*, it may, perhaps, be considered of some weight and consideration upon the point.

Observations upon *Doe d. Cock v. Cooper*.

It remains to notice the case of *Dunk v. Fenner*, (b) recently cited and observed upon at some length. (c) In that case, it will be remembered, the Court adopted the

Case of *Dunk v. Fenner*, and observations upon it.

(z) 1 East, 229.

(b) 2 Russ. & My. 557.

(a) 2 Pow. Dev. by Jarm. 582, n.

(c) *Vide supra*, p. 200, et seq.

construction of an indefinite failure of issue, as regards both the real and personal estate, notwithstanding that the words, "after her decease," occurred in the ulterior depositions, in reference to the person, on the failure of whose issue they were to take effect; and yet that, at the same time, some of the gifts so made were held valid, as depending only on the decease of the first taker. This decision, it must be confessed, is utterly incomprehensible on any other ground, than that, where expressions, referring to the decease of the first taker, occur in or after a limitation-over on his death without issue, such expressions may be attended to, so far as to be allowed to give effect to the ulterior gifts, if at the time of the first taker's death there are no issue, but that the words in question cannot have the force of restricting the failure of issue itself to that period. For a doctrine of this kind, there might, perhaps, be some show of argument. But *Dunk v. Fenner* cannot be supported upon any such ground. For the ulterior gifts of the *corpus* of the personal estate were in that case held to be void; and, as to the realty, it was decided, that the subsequent limitations took effect as remainders; of course, on a similar ground. The result of the decision, therefore, was this: that the failure of issue contemplated was indefinite; that certain bequests of legacies which were not to take effect, except in the event of default of issue, were, nevertheless, good, because, as to them, the failure was restricted to the death of the first taker; while the gifts of the *corpus* of the personalty, whereout those legacies were to be satisfied, and which were to take effect in the very same event, were void, as too remote. To say, that such a decision is not referrible to or explicable by any rule or principle of legal construction, applicable to a single scheme of disposition, complete in itself, and evincing one uniform intension, appears to be almost superfluous. But when to this consideration, is added, that, of the gifts of the *corpus* of the property expressly referring to the event on which the legacies depended, as coincident with that on

which the former were to arise, room is left for no other supposition, than, that the extraordinary character of the decision is to be attributed to the apparent circumstance, of no argument having been addressed to the Court, upon the point of the remoteness of the gifts of the legacies. Had such a view of the case been pressed, there can be little doubt, that either the bequests of the legacies would have been held too remote, in accordance with the principle of construction adopted in reference to all the other gifts; or, that the Court would have harmonized the interpretation, by holding, that all the ulterior gifts depended upon one, namely, a restricted, failure of issue, and that, therefore, as to both realty and personalty, they were good Executory limitations. At all events, it may be affirmed, that *Dunk v. Fenner* is an authority of no very decisive character, upon the force belonging to the expression, "after his decease," or the like, in regard to the construction to be put upon words importing a failure of issue.

Here, it may be observed, that where the words, "after his decease," &c., occur merely as a *referential* expression, and are not themselves used to introduce the limitation depending on the failure of issue, they, without doubt, have no force, in relation to the extent or character of that failure. Thus, where (*b*) there was a gift by will, in case the testator's daughter, M., should die without issue, and subsequent gifts were made, "after her decease *in manner aforesaid*:" it was held, that those words must be construed to refer to the daughter's decease without issue, and, therefore, to mean, *after the failure of issue at any time*.

Upon the whole, it must be observed, that no sufficient authority at present exists, for extending the restrictive force of the words, "after his decease," or the like, to limitations of real estate, however well established the rule, in regard to similar gifts of personalty. That the inference arising

Words "after his decease as aforesaid" occurring as a referential expression only.

Observations as to present state of the law, respecting the force of, "after his decease," &c., in gifts of realty.

from such expressions in favor of a confined signification of words importing a failure of issue, is equally strong, whatever the nature of the subject-matter of the gift, is plain; and it is by no means clear, that that presumption will be restricted to limitations of personal property, should occasion arise for an actual adjudication on the question. If that course *be* adopted, however, the reason of the difference of construction must be sought for, in the greater facility with which the Courts are accustomed to admit the restrictive interpretation, in respect to limitations of real, than of personal, estate.

7. Circum-
stance of gift
having refer-
ence to prior
limitation on
failure of
issue, clearly
restricted.

7. Another circumstance, sometimes restrictive of words primarily importing a general failure of issue, is that, of the particular gift in reference to which the question arises, occurring subsequently to another, which is, either expressly, or by legal implication from accompanying expressions or circumstances, to take effect upon a dying without issue living at the death of the ancestor. (e) This rule is founded on a presumption, that when an event of the same character is contemplated in two distinct gifts, the author of the limitations also had in his mind an accordance in (what may be termed) the adjuncts or accessories of the contingency; and that any difference in the expressions used is to be referred to the very common and natural tendency, to speak less precisely, or more summarily, on a subject, or of an event, previously particularised: or if the first mention of the contingency be not, in itself, technical and definite, but derive its particular purport from accompanying expressions, or circumstances extrinsic, as that borrowed or accidental precision proceeds from a presumed intention (not less clear, because informally evinced, or incidentally deduced,) the recurring expression of a similar contingency, in general terms, is entitled to or demands a similar interpretation, although it may not be assisted by the like incidental manifestations

(e) See Prior on "Issue," 90, *et seq.*

of intention; in other words, the rule, *noscitur a sociis*, has place.

It may suffice to mention one case, in which this referential construction has obtained. Thus, in the late case of *Radford v. Radford*, (f) there was a devise of freehold and leasehold estates, to A. and B., as tenants in common, and the heirs of the body and bodies of the said A. and B., as tenants in common, and if either of them should die without leaving issue, then, as to the share of such of them as should so die without issue as aforesaid, to the use of the survivor of them, the said A. and B., and the heirs of his body; and in case both of them should die without issue of his or their body or bodies, then, to the use of C. for life, with remainder, to trustees to preserve, &c., and divers remainders-over: and it was held, that the *limitation to the survivor* was a good limitation by way of Executory devise; that by the word, "issue," in the succeeding clause, the testator intended, *such issue as were to take under the prior limitation*; and that, consequently, the limitation-over to C. was not too remote.

Case of *Radford v. Radford*.

In the application of the rule under consideration, it is manifest, very great caution is requisite; else, the mere circumstance, that in one part of an instrument, a restricted failure of issue is, either expressly or by implication, contemplated, might be deemed sufficient to rebut any other construction, however deficient the grounds for a limited construction, or adverse the inclination and rules of legal interpretation.

Caution requisite, in the application of this doctrine.

One limit to the application of this doctrine seems to be, that the limitation, which is the subject of the supposed referential construction, should be posterior in order, to that which is to lead the interpretation. Without this, settled rules of construction would be open to unlimited interference, and groundless intrusion; and in default of this, that which

Referential limitation must be subsequent to that, leading the construction.

(f) 1 Keen, 486. And see the previous cases of *Sheppard v. Leasingham*, Ambl. 122; *Kirkpatrick v. Kirkpatrick*, 13 Ves. 476; *Morse v. Lord Ormonde*, 1 Russ. 382. See

vide *Lepine v. Ferard*, 2 Russ. & My. 378, but Sir J. Leach and Lord Brougham differed, as to the construction of the failure first mentioned.

is the whole and sole basis of the doctrine fails; and this, in its turn, becomes subject to question, as resting on no solid or rational foundation, by reason of its extension to cases, which cannot share with it a common principle of operation.

As between prior express and implied restriction of failure, latter more favorable to referential construction.

Again, it would appear, that there is more ground for the application of the doctrine in question, when the failure of issue first mentioned is only, *constructively*, restrained to the death of the ancestor, than when that failure is, by express terms, so restricted; for, in the latter case, there will, generally, be such a marked difference in the expressions used, as almost to give rise to the presumption, that two kinds of dying without issue were intended. (*g*) When, however, the restriction of the first failure proceeds from implication, grounded on accompanying expressions or extrinsic circumstances, the deficiency in preciseness of the contingency subsequently contemplated, raises no presumption as to an intended distinction in the character of the respective events.

And doctrine more readily applied to cross-limitations, with subsequent gift-over, on failure of issue of all the objects of prior gift.

Further, it should seem, that this rule more easily applies to cases, where the first gift, on a dying without issue, is to one or more of two or more persons taking under a prior limitation, in the event of the death of *either* without issue, and the subsequent gift is on failure of issue of *all* the objects of the previous limitation. (*h*) Here, a strong presumption arises, that the author of the gifts intended a coincidence between the event, on which the cross-limitation was to depend, and that, on which the ulterior gift-over was to take effect. And in this case, the referential construction seems better founded, because of the relationship which exists between the gifts depending on the respective failures, and, also, because of the closer contact into which the two limitations in question are, generally, brought, when they actually occur. Nor does the influence of these considerations appear

(*g*) See, as to this, 2 Jarm. Wills, 356, n.

hereafter arise in the case of *Ridgeway v. Munkettrick*, 1 Dr. & War. 84.

(*h*) A question of this kind may

to be the less, when the cross-limitation is made to persons, by name, and not under the description of "survivors" or "survivor."

Again, if, in regard to the property first limited, there be a *distinct gift to the issue*, by force of which, the failure described in the limitation-over is restricted, but the failure of issue contemplated in a *subsequent* disposition be *not* preceded by any such prior limitation, the objects of which might qualify its general meaning, the indefinite construction, in the latter case, will not be rebutted by reference to the prior clause of gift. (i)

But rule will not apply, if first failure restricted on ground of previous express gift to issue.

But, in truth, the application of the restricted construction under consideration, may be said to depend, in so great a degree, on the particular circumstances of every case, that no general rules can be laid down with respect to it, which would not admit of frequent infringement. The slightest indication, however, that the failure of issue, contemplated in the ulterior gift, is to be of the same character with that on which a prior one depends, will be sufficient to give it place, if the construction of a restricted failure be clearly established, with respect to the previous limitation.

Difficult to prescribe definite rules in reference to this doctrine.

8. Another circumstance, generally considered inconsistent with the construction of an indefinite failure of issue, is that, of the ulterior limitation being made to depend, not only on a failure of issue of the first taker, but, also, on the *decease of such issue under twenty-one, or any other specified age*. The superaddition of such a contingency plainly shows, that by the term, "issue," was meant, not, indeed, necessarily, the immediate offspring of the person named, but all issue living at his decease. (k)

8. Circumstance of gift being to take effect on failure of issue, and death of such issue under a particular age.

In most of the cases, in which limitations of this character have occurred, there have been previous express gifts to the issue; and the question has generally been, whether

(i) *Carter v. Bentall*, 2 Beav. 551.

Sim. 591; but the V. C.'s observations were, clearly, unnecessary and extra judicial.

(A) See 2 Jarm. Wills, 331, 333, 352, 353; Prior on "Issue," 73. See *vide* *Grimshaw v. Plotup*, 9

the parent should take an estate-tail, or the issue succeed by purchase; under which circumstances, no question of remoteness could arise. (1)

Age specified must not be greater than twenty-one, or gift-over will be void, if first-taker leave issue surviving.

It must be observed, that if the age, on non-attainment of which, by the issue, the limitation-over is to arise, be greater than twenty-one, that limitation will not be capable of taking effect, in the alternative of the person named leaving issue surviving him; for, although the single contingency of the failure of issue is restrained to the time of the death, by the effect of the superadded contingency, yet, if that event do not happen, the ulterior gift must then depend on the other contingency with which it is associated; and that being, upon the hypothesis, too remote, the limitation-over necessarily fails.

9. Circumstance of gift-over being on failure of testator's own issue.

9. A further circumstance, giving rise to a restricted construction of words importing a failure of issue, occurs, it is said, (m) when there is a devise in *default of issue of the testator's own body*; which, unless there are expressions, plainly indicating, that the testator intended a failure of issue whenever it may happen, refers to a failure of issue *living at the time of his own death*. This is, what may be termed, a natural construction, because it most accords with, what must be presumed to have been, the testator's meaning. The words may be, and generally are, sufficiently comprehensive, to admit of the construction of an indefinite failure of issue, and, as applied to ordinary cases, might, indeed, *require* such a construction. But when an interpretation is to be put upon terms used by a testator, in reference to himself, and to a particular condition of his family, the most reasonable view to be taken of his meaning and intention, is, that he was referring to a state of things which might, or might not, exist, at the

(1) See *Doe d. Davy v. Burnall*, Wright, 2 Bligh, 58; 2 Jarm. Wills, 6 T. R. 30; *Merest v. James*, 1 292, 347.

Brod. & Bing. 484; *Lees v. Mosley*, (m) 2 Pow. Dev. by Jarm. 567, at 1 You. & Coll. 589; *Doe v. Goff*, seq. Powell's note to F. Ex. Dev. 11 East, 668; Judgment in *Jesson v.* 136, et seq. Cru. Dig. tit. 38, c. 18.

time of his own decease, that being the period of the will taking effect.

Thus, where (n) a testator, after directing all his debts to be paid, "*in default of issue of his own body*," gave to trustees and their heirs, certain lands, &c., in trust, to pay his sister, an annuity of 100*l.*, till his debts and legacies were paid, and, after payment thereof, to his sister for life, with divers remainders over, in strict settlement; on a case sent from Chancery for the opinion of the Court of B. R., it was objected, that this devise, being after an indefinite failure of issue, was executory and too remote; to which it was answered, that it was not executory, but depended upon a precedent conditional event, to be ascertained at the testator's decease: the Court certified, that the trustees took a base-fee, determinable on the payment of the testator's debts and legacies, out of the profits of the estates; and, principally, upon the ground of the devise being merely conditional, *in case he left no issue of his body*. And Lord Mansfield, C. J., observed, that where a devise must take effect, if at all, at the death of the testator, it is not, properly, an Executory devise; but that such a devise was a devise upon a contingent event, which must happen at or before the death of the testator: an Executory devise is a devise that is to take place *in futuro*.

Case of
Wellington v.
Wellington.

And so, in another case, (o) A., being seised of divers estates, by virtue of a settlement made by his mother, to the use of himself for life, with remainders in strict settlement, with a remainder in fee, vested in himself, as right heir of his mother, made his will, by which he devised all his estate in certain counties (wherein the settled estates were situate,) "upon default of issue, male and female, of his own body," to trustees, in trust, to pay his just debts and legacies, and after payment thereof, over; and he bequeathed annuities to his

Case of
French v.
Cadell.

(n) *Wellington v. Wellington*, 1 Bl. ton v. Lytton, 4 Bro. C. C. 441;
R. 645; 4 Burr. 2165. *Sanford v. Irby*, 3 B. & Ald. 654;

(o) *French v. Cadell*, 3 Bro. Parl. Doe d. Raw v. Lucraft, 8 Bing. 386;
Ca. Toml. edit. 257. And see *Lyt-* *Benn v. Dixon*, 10 Sim. 636.

sisters. The case arose on an appeal from a decree, in favor of the devisees, by the Lord Chancellor of Ireland ; and the question material to our present subject was, whether the devise of the settled lands was valid. On the one side, it was contended, that the devise was void, for want of a particular-estate, to support it as a remainder, and too remote, after a general failure of issue, to take place as a future or Executory devise. On the other side, it was argued, that the devise under the will of A. was, at his death, a devise *in possession*, and not an Executory devise: no estate was limited to the issue by the will ; but it was plain, the testator meant, a failure of issue *living at the time of his death* : the contingency was determined, the instant the will took place, viz., the testator's death : the first trust was to pay debts, legacies, and annuities, to his sisters, for their lives ; and he could not have intended that those trusts should take place, one hundred or two hundred years after his death. The House of Lords dismissed the appeal, and affirmed the decree of the Court below.

Observations upon these cases, and extent to which they affirm the doctrine.

In both the last cited cases, we are to observe, that there were special circumstances in the will, affording a presumption, that the testator, in devising his estate, in the event of a failure of his own issue, considered he was making a disposition, which would either take effect, or fail, at his own decease. In both wills, the devise had reference to the payment of the testator's debts ; a provision not easily reconcileable with the notion, that he had in his mind, an event of indeterminate occurrence, such as, an indefinite failure of issue. It may, perhaps, therefore, be doubted, whether the doctrine in question amounts to any thing more, than, that the Courts, in putting a construction upon words, having reference to the failure of the testator's own issue, will pay attention to any slight expressions and circumstances, which indicate, that he had in his contemplation, the event of such a failure *at his own decease* ; there being a *prima facie* presumption, that such construction

most accords with the testator's meaning, though, probably, of itself, insufficient to rebut the primary legal signification of words importing a failure of issue.

It seems clear, at all events, that nothing must appear upon the face of the will, indicating, that the testator had in his contemplation, the failure of any remoter issue than his own immediate offspring, namely, *children*. Thus, in one case, (*p*) a testatrix gave a remainder, to which she was entitled after the death of her husband, who had a particular-estate for his life, thus:—"To my dear children, if I should leave any to survive me; but in case I should leave *no such child or children, nor the issue of such child or children*, and after the decease of my dear husband, then I give and bequeath my said estates to J. H., making him hereby sole heir of this my last will and testament, *in default of issue left by me*, and after the death of my dear husband;" and a question arose, whether the limitation to J. H. was a contingent executory limitation, upon the testatrix's dying without any children living at the time of her death, or a remainder expectant upon an estate-tail in those children. Lord *Hardwicke* said:—"It has been objected, that these words must be construed only, children and issue the testatrix should leave at the time of her death; and that, therefore, the remainder given over is a contingent executory interest, to take place only, if she left no children at the time of her death. The words, 'if I should leave any to survive me,' are quite nugatory; for no person can take under a will, unless upon surviving the testator; and then the question is, whether it is necessary to carry on these inoperative, ineffectual words, to the subsequent part of the devise. It is not at all necessary. She meant to describe, 'If I should leave no children, at the time of my death, nor issue, at any time, I give my estate over.'" And it was, accordingly, held, that J. H. was entitled, upon a failure of the

Contingency
must have
reference only
to testator's
children.

testator's issue, happening subsequent to her decease. This case is not adduced, as an authority strictly apposite to the present subject, but only as supplying a rule of interpretation, applicable to similar gifts, to take effect on failure of a testator's own issue. In the case in question, the consequence of holding the gift to refer to a failure of issue at any time, was not, the invalidity of the ulterior limitation on the ground of remoteness, but, the giving it effect as a remainder expectant on a preceding estate-tail.

Whether necessary that testator should be childless.

According to the terms in which the doctrine under consideration has sometimes (q) been laid down, it would appear, that it applies only to the case of a testator, *childless* at the date of his will, and not, to that of one who has then any issue. And the unreasonable character of such a circumstance, as an ingredient in the conditions of the rule, has exposed the rule itself to the doubts and animadversions of a learned writer, (r) who has very properly remarked, that no stronger reason can exist for giving a restricted construction to words, having reference to the failure of issue of a bachelor or childless testator, than, to a similar contingency as respects any other person, either unmarried or without issue. Indeed, the annexation of such a condition to the operation of the rule, almost destroys the distinctive principle on which it rests, which is (one *sui generis*) solely referrible to the circumstance, of the event contemplated being connected with the testator himself, and of the dispositions, by which that event is provided for, necessarily waiting for effect until his decease; which is also the time, most reasonably to be supposed as intended by him, in any reference to a particular state of his family. The intrusion into the pre-requisites of the rule, of a contingency, such as that in question, is not only unnecessary to the pre-

(q) 2 Pow. Dev. by Jarm. 567. Mr. Cruise's Digest has also been cited, as supporting this view (see Prior on "Issue," 93); but the writer cannot discover in that learned au-

thor's few observations upon this subject, any ground for that conclusion. See Digest, tit. 38, cap. 18, ss. 26, 27.

(r) See Prior on "Issue," pp. 92—96.

servation of its own symmetry, or of the integrity of the grounds on which it is based, but may even be said, to be destructive of harmony and consistency alike. And, moreover, it seems to be conceded, that the rule will not be rendered inapplicable by the subsequent birth of issue, if the testator leave none *surviving him*; (s) an admission, which appears to deprive even this inconsistent qualification, of any consistency in itself. But it also happens, further, that in one (t) of the very cases which have been adduced in support of the rule, the testator actually had issue of the description specified, at the date of his will, although they subsequently failed in his lifetime. The circumstance of the failure of the issue in the testator's lifetime can prove nothing; for that is the very event, the happening of which will, and alone can, *ex hypothesi*, give effect to the limitation: whether the testator have issue or not, there must be a failure at the testator's death, or the supposed gift will not arise.

The truth is, it has so happened, that in the principal authorities for the rule, the testator was childless at the date of his will, and that circumstance, having been, at the time, brought prominently forward in favor of the restricted construction, has come to be regarded as essential to its operation. With deference, however, to other opinions, it is conceived, that how much soever the circumstance of the testator having no issue at the date of his will may facilitate, and present a fairer appearance for, the application of the rule, it is in no way a condition of that application, nor its want, a hindrance thereto, of any moment.

10. Besides the various expressions and circumstances, the effect of which, in the construction of limitations upon a failure of issue, has hitherto engaged our attention, many others will suggest themselves to the reader, of various force and import, which do not admit of regular classification.

(s) See 2 Pow Dev. by Jarm. 654. See also *Doe v. Lucraft*, *ubi* 567.

(t) *Sanford v. Irby*, 3 B. & Ald.

Accidental, that the authorities are confined to instances of childless testators.

10. Miscellaneous expressions and circumstances, to which restrictive force is denied.

Any words which unambiguously indicate an intention in the author of the gift, to confine the failure of issue on which the estate is given over, to a dying without issue living at the death of the first taker, will be sufficient to rebut the construction of an indefinite failure of issue.

Words "then,"
or, "immedi-
ately there-
upon."

But these words or expressions must be clear and definite, as pointing to the specific period of the first taker's death. And, therefore, in general, mere adverbs of time will not suffice for this purpose, as they are capable of being referred to the happening of the specified event, however remote, and do not, necessarily and exclusively, point to the particular period of the first taker's death. Thus, if there be a limitation to A., and his heirs, and in the event of his dying without issue, *then*, or *immediately thereupon*, to B.; there is no question, that the ulterior gift is void. (u) But such adverbs, when used conjointly with any other expressions, which aid the construction of a restricted failure of issue, will be of weight, in putting an interpretation upon the limitations.

"After him."

Again, it is clear, that the expression, "after him," in a gift-over on failure of issue of the first-taker, will not have the effect of controlling that failure to the time of his death. (v)

Limitation of
unentailable
copyholds,
upon a general
failure of issue,
how construed.

In reference to all the foregoing rules and distinctions, it is to be remarked, that if the subject-matter of the limitation be land of *copyhold* tenure, and the custom of the manor do not admit of the creation of direct entails, any gift which, in the case of freehold property, would confer, by implication or otherwise, an estate-tail, has the effect of creating a conditional fee in copyholds. Thus, in a recent case, (w) copyhold lands held of the manor of K., in which there is no custom to entail, were devised to J. S., and his heirs,

(u) See *Beauchamp v. Dormer*, 2 S. C. 19 Ves. 545.

Atk. 308. *Biggs v. Bensley*, 1 Bro. C. C. 187.

(w) *Doe d. Blesard v. Simpson*, 4 Bing. N. S. 333—340; 3 Scott, N. S. 774.

(v) *Donn v. Penny*, 1 Mer. 20;

but if he should die *without leaving any child or children*, then to M. B., and her heirs: and the Court of C. B. decided, that a fee-conditional passed to J. S.; and that, as the fee-conditional had merged in the possibility of reverter, which had descended to J. S., (the consequence of the construction being, that the gift to M. B. was void, as limited after a fee,) as heir of the devisor, he had become seised of a fee-simple absolute. In the case of a similar limitation of freeholds, it will be remembered, J. S. would have taken an estate-tail, with remainder, to M. B. in fee; the word, "children," being construed, "issue."

It is, further, established, that the circumstance, of property comprised in a limitation being of the tenure of unentailable copyhold, will not induce a Court of law to construe words, primarily importing a general failure of issue, as referring to a failure at the death, so as to enable the ulterior gift to take effect as an Executory limitation; but that, whatever construction would be put on the words in question, if applied to a limitation of freehold lands, will also hold in regard to a similar gift of copyholds, although the consequence be, the invalidity of the ulterior limitation, by reason of no remainder being allowable after a conditional fee. (x)

The various rules and distinctions which have been here noticed, in reference to a restricted construction of words, importing a failure of issue, can be considered only as bearing upon limitations in wills, so far as their extension to instruments *inter vivos* depends upon express authority. The greater precision and technicality, observed in limitations in deeds, have, in some degree, rendered practically unnecessary, the consideration as to them, of the question of the construction to be put upon words of doubtful import, in reference to a failure of issue, or of the force to be attributed to accompanying expressions, and circumstances *dehors* the gift. Nor is it possible to affirm, that there is an applicability of all authorities upon the construction of testamen-

Restricted construction will not be induced by circumstance of a copyhold not being entailable, and of consequent invalidity of ulterior gift.

General observations, as to applicability of foregoing rules and distinctions to limitations in deeds.

(x) *Doe d. Blesard v. Simpson, ubi supra.*

tary limitations, to similar gifts in deeds, for the broad distinction between the two classes of instruments, in regard to all questions of construction, precludes the supposition, that the inclination to give effect to informal and obscure exhibitions of intention, on the part of testators, would, to any considerable extent, be shown, to similar indications in instruments *inter vivos*. Indeed, the presumption is, that unless the intention in favor of a restricted failure were manifested so strongly, as to render a different interpretation, an instrument of violence to plain language and express provision, the Courts would always adhere to the construction favored by antecedent inclination of law, notwithstanding the existence of circumstances, which, in the case of testamentary dispositions, would restrict the failure, to the death of the ancestor. Any case that may arise, upon the restrictive force of either of the expressions or circumstances above considered, in reference to limitations in deeds, will, the writer believes, be one almost *primæ impressionis*; and it would, therefore, be rash, to speculate upon the probable weight that might be attached to any particular circumstance or expression, as connected with a limitation, by instrument *inter vivos*, to take effect on failure of issue, either of a prior taker, or of a stranger.

Limitation to A., and the heirs of his body, and if he leave no issue at his death, over.

It may be observed here, in fine of this branch of our subject, that if land be given to a person, and the heirs of his body, with a limitation-over in the event of his dying without issue living at his death, the ulterior gift does not operate as a conditional limitation, partially defeating or suspending the first estate-tail, but as a contingent remainder, to take effect in possession, if the first-taker leave no issue at his death. (y) Of course, where the word, "leaving," only, is used in the limitation-over, no question can exist as to its character; as, in the case of real estate, that word simply refers to the failure of the issue inheritable to the entail.

(y) See *Wright v. Pearson*, Ambl. gift, in *Doe d. Elsey*, 4 East, 313; 358; and an instance of this kind of and 2 Jarm. Wills. 359.

SUBDIVISION II.

Of the exceptions to the rule, invalidating limitations of realty, to take effect on an indefinite failure of issue.

We now approach the discussion of the exceptions to the rule, which avoids gifts depending on a general failure of issue, as being too remote.

1. The first is, where a person, being entitled to a reversion or remainder expectant on the determination of an estate-tail, either general or special, devises the property to another, after failure of issue of the tenant in tail, being the issue entitled under or inheritable to the entail. (x)

1. Devises or reversions expectant on estates-tail.

The commencement of the devise, in such a case, takes place, in point of *interest*, immediately upon the death of the testator, and only the event, on which the estate devised shall take effect in *possession*, is postponed: that is, the property limited is a present fixed interest, although it must wait for future possession. And as there was no danger of a perpetuity in the original reservation of a reversion upon an estate-tail, so is the devise of such an interest, to take effect upon the event which will determine the estate-tail, and bring the former into possession, equally free from objection on the ground of remoteness. In other words, the contingency contemplated has reference only to the event on which the testator's power of disposal arises, and the devise, therefore, enures as a present gift of a future expectancy. (a) Thus, in an early case (b) a person conveyed his estates, to the use of himself for ninety-nine

Nature and operation of such devises.

Case of *Badger v. Lloyd*.

(x) 2 Prest. Abet. 161. 2 Pow. Dev. by Jarm. 560. Prior on "Issue," 96. 2 Jarm. Wills. 406, *et seq.*

(a) Prior on "Issue," 97.
(b) *Badger v. Lloyd*, 1 Raym. 523; 1 Salk. 232.

years, if he should so long live, remainder, to his wife, in the same manner, remainder, to his son, John, in the same manner, remainder, to trustees and their heirs during the lives of the father and son, to preserve contingent-remainders, remainder, to the *first and other sons of the son in tail male*, remainder, to the father in fee: the father made his will, and after reciting the settlement, devised the lands, *from and after the death of his son without issue male*, to another son. It was objected, that the devise was executory, and as it could only take effect upon the death of the son without issue, it was void, as being too remote. But to this it was answered, that here, a man, seised of a reversion expectant on an estate-tail, devised it after the death of the tenant in tail without issue, to another; this was not an executory, but an immediate devise, and the words, "from and after," were only a declaration when it should take effect in possession. If the son had not an estate-tail in the land, but the devises had been, after the death of a stranger without issue, they would have been Executory devises, and void by reason of the remoteness of the possibility; but here, they were limited after the determination of the particular-estate.

Case of *Lytton*
v. *Lytton*.

And so, where (c) a person, having, by articles on his marriage, agreed to settle his estate after his own decease, to the intent, that his intended wife should receive a certain jointure, and subject thereto, to the *first and other sons* of the marriage *in tail*, remainder, to himself in fee, but never having made a settlement in pursuance of the articles, by his will, gave and devised his estates, on *failure of issue male of his body*, to trustees, to raise money for the payment of his debts, and subject thereto, to his nephew and his issue, in strict settlement: Lord *Loughborough* (reversing a previous decree of Lord *Northington*,) held, that from the situation of

(c) *Lytton v. Lytton*, 4 Bro. C. C. 441.

the testator and his family at the time he made his will, and from the general tenor of such will, it was evident, that he did not mean more, than to take in the event, which alone prevented the estate from being the subject of an immediate devise, and, therefore, decreed in favor of the parties claiming under the will.

But in order to a limitation, after a dying without issue, taking effect as a devise of a reversion expectant upon an existing estate-tail, it is necessary, that the event, on which the devise is intended to take effect, should be the very same event which will determine the estate-tail; or, in other words, that the issue described in the will, should be the same as are inheritable under the entail. For example, if there be an existing estate in special tail, limited to A., and the *heirs male* of his body *by B.*, with remainder, to C.; a devise by C., in the event of A.'s death *without issue*, will be void, as being to take effect on a general failure of the issue of A., there being no corresponding estate-tail in existence. To the extent of the difference between the issue entitled under the estate-tail, and the issue described in the will, the devise resembles a limitation after a failure of issue, unpreceded by any kind of estate whatever, which is, generally, void, as too remote. Thus, where (d) A., having the reversion in fee of lands, (which, upon the marriage of his son, B., he had settled upon himself for life, remainder, to B. for ninety-nine years, if he should so long live, remainder, to trustees and their heirs, during the life of B., remainder, to the *first and other sons of B.*, successively, in *tail male*, remainder, to the heirs male of the body of B., reversion, to A. in fee,) devised all his lands mentioned or contained in the settlement, on *failure of issue* of the body of B., and for want of *heirs male of his own body*, to his daughter, F., and the heirs of her body: it was adjudged, in D. P., that the devise to F. was executory and void, as

There must be a coincidence between issue, inheritable to entail, and issue, on whose failure devise is to operate.

Case of Lady Lanesborough v. Fox.

(d) *Lady Lanesborough v. Fox*, Ca. T. T. 262.

being on too remote a contingency. It will be observed, that in this case, the limitation to the daughter was future, to arise after the failure of issue of the body of B., and of heirs male of the body of A.; and, therefore, the devise could not be considered as that, of a reversion, depending or expectant on preceding estates-tail, there being no subsisting estate, extending to all the issue of the body of B., nor any estate-tail in A. himself, to devolve on the heirs male of his own body. But if B. had, by the settlement, been tenant in tail general, remainder, to A. in tail male, the reversion, to him, in fee, then, the devise to F. would have been a good immediate devise, to take effect out of A.'s reversion in fee. (e)

Case of *Bristow*
v. *Boothby*.

And so, where, (f) by a marriage settlement, property was limited to the sons of the marriage in *tail male*, remainder, to the daughters in *tail general*, remainder, to the survivor of the husband and wife in fee, and a power was given to the wife, if the husband survived, and *all the children of the marriage died without issue*, to raise a sum of money; it was held, that the power was too remote, being limited on failure of issue, not taking under the limitations, viz., the daughters of sons. This latter case, it is true, was not an example of the devise of a *reversion*; but it serves as an illustration of the doctrine under consideration, because the limitation in question was to arise on a general failure of issue of the marriage, including issue not inheritable under the prior limitations.

Case of *Banhes*
v. *Holme*.

So, again, in another case, (g) lands being settled on O. M. for life, remainder, to his wife, D., for life, remainder, to his first and other *sons* on the body of the said D., in-*tail male*, remainders, to his *daughters* on the body of D., as tenants in common in *tail-general*, with the ultimate remainder, to O. M. in fee; O. M., by his will, after reciting,

(e) F. C. R. 449.

(g) *Banhes v. Holme*, 1 Russ.

(f) *Bristow v. Boothby*, 2 Sim. & Sta. 465.

394, n.

that under the settlement he was seised of the estates after the decease of his wife, in case there should be no child of his wife begotten by him, or, being such, they should all die without issue, devised “the aforesaid reversion,” in case he should die *without leaving any children or child*, or, there being such, all of them should happen to depart this life *without issue*. It was held by Sir J. Leach, V. C., and, afterwards, in D. P., that the devise was void, as too remote ; in other words, that it did not operate as a simple disposition of the testator’s reversion.

It is further established, that an estate-tail will not be raised by *implication* in the parent, so as to include the issue who are not inheritable to the existing entail, and thereby to support the devise as a remainder. Thus, in the case of *Lanesborough v. Fox*, above cited, it was decided, that no estate-tail could be given by implication to B. ; and this decision was adhered to in a subsequent case, as a direct authority against admitting such an implication. (h) If, however, the parent take a *prior estate* under the will, susceptible of enlargement, then, it is conceived, an estate-tail *will* be raised in him by implication, in accordance with the general rule on that subject, before considered ; the application of which is not, it would seem, precluded by the circumstance, of express estates-tail being vested in *some* of the issue, under a prior (or, even, under the same) instrument. (i)

No estate-tail raised by implication in ancestor.

Unless he take prior estate under the will, capable of enlargement into estate-tail.

But it is to be observed, that the Courts will, in general, endeavour to construe the words used by the testator, to mean, the issue who *take under the existing settlement* ; although such words may, abstractedly considered, contemplate an *indefinite* failure of issue.

Efforts will be made to refer issue mentioned in will to issue entitled under estate-tail.

(n) See *Jones v. Morgan*, 3 Bro. Parl. Ca. 322 ; and App. to F C. R.

(i) See the case of *Daintry v. Daintry*, 6 T. R. 307, where an

estate-tail was raised in a person by implication, although the will contained a devise of an *express* estate-tail, to the same person, in a *contingent* event.

Case of *Jones*
v. Morgan.

Thus, in one case, (*k*) A., previously to his marriage with B., settled certain lands, &c., upon himself for life, remainder, to trustees, to support contingent remainders, remainder, (subject to a jointure rent-charge to his wife) to his *first and other sons by the said B. successively in tail male*, reversion, to himself in fee (subject to trusts for raising pin-money and portions for younger children). Afterwards, A., having two sons of that marriage, made his will, by which, after giving certain *specific* things to his wife, B., and the two sons, he declared his will, that in case his said sons, *or any other son or sons of his, thereafter to be born*, should happen to die without issue male of their bodies, then, he devised the settled lands, &c., to his brother, T., for his life, but subject to the several provisos and payments mentioned in his marriage settlement, with divers remainders-over. And the testator appointed his wife, one of five guardians of his children, and also one of his executors; and died, leaving his wife, B., and two sons, and two daughters, surviving. It was insisted, against the validity of the devise to T., that it was void, as not being expressed to take effect upon failure of issue male of the testator's sons *by his then wife*; but the words were general, and extended, as well to the future sons of the testator *by any after taken wife*, as by his then wife; which would not admit of the limitations taking effect as a devise of the reversion, immediately expectant on the determination of the estates created by the settlement. On the other hand, it was contended, that the testator had not a future marriage in view, as appeared from his giving some *specific legacies* to his then wife, and naming her one of his executors, and also one of the guardians of his children; and that, therefore, the limitation to T. must be considered as an immediate devise of the reversion, subject to the estates created by the settlement. The judges of B. R., on a case stated to them, certified, that they were of opinion, that the

(*k*) *Jones v. Morgan*, ubi supra.

event of a second marriage was not in the testator's contemplation, and, consequently, that the words, "or any other son or sons, &c.," must be restrained to sons of the marriage with B., who were all entitled under the settlement. The Lord Chancellor's decree was in conformity with this opinion; and the House of Lords, upon appeal, affirmed that decision. Here, we observe, that the Court laid hold of several circumstances arising on the will, to show, that the testator had in his mind, the estates created by the settlement, and his own reversion expectant thereupon; and, in addition to the circumstances urged in the argument for the devise, we may notice, the reference to the charges created by the settlement, made in the devise to the testator's brother for life, as plainly indicating, that the settlement was in his contemplation, and that he considered himself disposing of all his reversionary interest under it, and that only.

And, again, in the above cited case of *Lytton v. Lytton*, (l) the Court confined the words, "on failure of issue male," of the testator's body, to mean, issue inheritable under the limitations of the settlement; and, in coming to this conclusion, the Court laid great stress on the circumstances of the testator and his family, which, it was said, had always been taken into consideration in these cases.

And agreeably to the two last-mentioned cases, seems to have been the decision in the case of *Sanford v. Irby*, (m) the facts of which were:—A testator, having an estate, which had been conveyed by the settlement executed on his first marriage, to trustees, to the use of himself for life, remainder, to *his first and other sons successively in tail male*, and having one son and two daughters by his first marriage, shortly after his second marriage, made his will, whereby he devised to his son, all his manors, &c., and personal property, subject to the payment of his (the testator's) debts and legacies; but in case his son should depart this life without

Case of
Sanford v.
Irby.

(l) 4 Bro. C. C. 441.

(m) 3 B. & Ald. 654.

issue male, or in case of *failure of issue male of the testator's body*, over, as in the will mentioned. The testator had no children by the second marriage, and his only son by the first marriage died under age and unmarried. A case being sent out of Chancery for the opinion of the Court of B. R., on the construction of this will, it was contended, that as the devise-over was limited on the failure of issue, not necessarily connected with the estates created by the settlement, it must be void; and to show that the testator had, probably, other issue in contemplation than those then living, reliance was placed on the circumstance, of his having just married for the second time, and on the natural expectation he must have entertained, of having other sons born. In support of the validity of the devise, three points were made: first, that the testator contemplated only failure of issue male of his body at the time of his death; (n) secondly, that the devise-over was to take effect in case of the failure of issue male of the testator, at the time of the termination of the estate-tail-male vested in the testator's son; and, lastly, that estates-tail might be raised by implication in after-born sons of the testator. The certificate sent by the Court was to the effect, that the devises in the will were valid; but, as usual in such cases, the reasons on which the Court founded their opinion, were not given. In reference to this case, it is observable, that, according to the report, it does not appear, that it was even *attempted* to support the devises, on the ground, that the testator referred to issue entitled under the limitations in the settlement; while, on the other hand, there was not only an entire absence of those peculiar circumstances in the state of the testator's family, which, in other cases, have shown, that he referred to the issue entitled under an existing estate-tail, but there was even a circumstance, affording an inference in quite a different direction, viz., the fact of the testator having recently contracted a second marriage, of which, he

(n) As to this, *vide supra*, p. 244, *et seq.*

might naturally expect there would be issue. What may be the exact extent of this decision, therefore, it is not easy to say, from the impossibility of ascertaining the precise ground on which it proceeded. Surely, it cannot be, that the Court considered the circumstances which actually happened after the date of the will, as making a difference in the construction to be put upon it? The character of the judges who signed the certificate forbids our supposing, that they lost sight of the rule of law, that a limitation-over, which, in its terms, is too remote, cannot be validated by the course of subsequent events. We may observe, that Sir *L. Shadwell*, V. C., who was counsel for the successful parties in *Sanford v. Irby*, remarked, in the case next noticed, he had always been of opinion, that it was a "strong decision." (o)

The only remaining case, to be mentioned in regard to the present subject, is that of *Egerton v. Jones*, (p) the facts of which were, as follow:—An estate was settled, in pursuance of marriage articles, on A. for life, remainder, to B., his wife, for life, remainder, to the *first and other sons* of A. and B. *in tail male*, remainder, to A. in fee. A., by his will, devised thus:—"As to the reversion and inheritance of the freehold estate at C., purchased by me in pursuance of my marriage articles, bearing date, &c., in case of *failure of issue of my body by my said wife*, I give and devise the same," &c., (limitations to the testator's brothers, in succession, and their respective issue, in strict settlement). A person, claiming under the *heir-at-law* of the testator, contracted to sell the property devised: and the purchaser refusing to complete his contract, a bill was filed, to compel a specific performance of it. The case was argued, on both sides, upon the question of the validity of the devise, as a disposition of the *reversion* vested in the testator under the settlement; and the opinion of the Court was in favor of the affirmative, and the bill, consequently, dismissed. In this

Case of
Egerton v.
Jones.

(o) See the observations of Mr. 96.
Prior, in his Treatise on "Issue," 95, (p) 3 Sim. 409.

case, the express reference by the testator to the "reversion and inheritance of the freehold estate" settled, left little doubt, as to what he intended to dispose of; and the mistake, in regard to the event on which that reversion would come into possession, was no more, than, every person, unaccustomed to the observance of the legal distinctions in the creation of estates-tail, would fall into.

Observations
on *Bankes v.*
Holme, and
Egerton v.
Jones, in
reference to
their different
conclusions.

This latter case, it may be observed, is scarcely distinguishable from *Bankes v. Holme*, in which, as we have seen, an opposite decision was arrived at. In each, was there a devise of the testator's "reversion;" and in each, there was express mention by the testator of the settlement, under which the existing estates-tail were created. One observable difference, however, between the circumstances of the two cases, was that pointed out in the argument in *Egerton v. Jones*, namely, that in *Bankes v. Holme*, there were limitations to female branches of the family, who were excluded by the settlement, which showed, that the testator had no intention to keep the property in the male line, in accordance with the limitations in the settlement; while, in *Egerton v. Jones*, female issue and branches were strictly excluded, and the reversion was devised to the collateral male branches of the family. This latter circumstance certainly seems to show, that the testator intended to follow up the purpose of the settlement, in excluding the female branches; which gives a clue to the discovery of what issue he meant: and the inference is the stronger, when, as in *Egerton v. Jones*, the testator actually has female issue. But too much reliance must not be placed upon a correspondence of this kind, between the limitations in the settlement and those in the will, for it may be said, that the exclusion by the testator, of a particular branch or line, proves only, at most, his own intention with respect to the devolution of the reversion, and furnishes no evidence, that, in the devise on failure of general issue, he considered himself as, in reality, providing only for default of a particular class of issue,

Whether
nature of
testator's dis-
positions can
afford any
inference, as
to the issue
referred to
being those
only entitled
under settle-
ment.

namely, the issue entitled under the existing entail. And this, especially, as unlearned testators are unaccustomed to the distinctions between general and special estates-tail. There was, also, another circumstance in *Egerton v. Jones*, which favored the conclusion there arrived at, but not to be found in *Bankes v. Holme*. In the former case, the testator expressly confined the failure of issue on which the devise was to take effect, to the particular class of issue (that is, issue *by his then wife*,) who were tenants in tail under the settlement, and his inaccuracy consisted only in extending the words of description, beyond the *partial* issue entitled. In the latter, however, the reference to the issue was not only too general, as including other than the partial issue inheritable to the entail, but, also, as extending to issue of *any* marriage. But, perhaps, this objection must be considered as having been removed by *Jones v. Morgan*; although it is observable, that in that case, there was not the *twofold* discrepancy in the characters of the respective events, which we have noticed in *Bankes v. Holme*. (q)

The result of the foregoing examination of the authorities seems to be, that the Courts will lay hold of any circumstances, whether arising on the will itself, or extrinsic to it, affording a reasonable presumption, that the testator, in using words which, abstractedly considered, refer to an indefinite failure of issue, contemplated only a failure of the issue inheritable to the subsisting estate-tail; and, upon the strength of those circumstances, will support the devise, as a disposition of the reversion, to take effect in the event, upon which it will come into possession. (r)

It is to be observed, in reference to those cases, where the issue referred to in the will are more extensive, those entitled under the estate-tail, only in the respect of their

General result of authorities, as to inaccurate references to contingencies on which reversions depend.

There can be no objection to restricting contingency to

(q) See the observations of Lord Eldon, on *Bankes v. Holme*, in 1 Russ. 406, 407; and, also, of Mr. Jarman, on the same case, and *Egerton v.*

Jones, in his Treatise on Wills, vol. 2, p. 411—413.

(r) See 2 Jarm. Wills, 413.

failure of issue taking under entail, as against issue of subsequent marriage, as birth of such issue revokes the will.

not being confined to a particular marriage, no objection can properly be taken to a restriction of the issue mentioned, to the class inheritable to the entail, on the ground of the testator being thereby made to exclude or disinherit issue of a subsequent marriage, for such subsequent marriage, either alone, or together with the birth of issue, (according as the will is, or is not, governed by the statute, 1 Vict. c. 26,) will operate to revoke the will, by mere operation of law. Indeed, it may even be said, with a late writer, (*s*) that the principle, on which the cases, confining the failure contemplated, to the issue of the marriage on which the settlement was made, were decided, "is only an extension of that, on which the rule of implied revocation is founded, *viz.*, that a testator, in making his will, has not the idea of future marriage and birth of issue in contemplation, and does not intend to provide for that event."

As to cases, where there are issue living, of marriage prior to that, the issue of which are inheritable to the estate-tail.

This suggests an inquiry, to which decided cases do not, as yet, enable us to return a decisive answer, *viz.*, whether the rule, which, in the case of a testator disposing of a reversion expectant on an estate-tail, descendible to issue of a particular marriage, refers expressions, primarily signifying a failure of general issue, to a default of the particular line of issue inheritable to the entail, will be extended to cases, where there are issue of a *prior* marriage in existence, and who are within the scope of the contingency contemplated by the testator, as expressed upon the face of the will. Now, it is obvious, at once, that there is a broad and intelligible distinction between these two cases: when there are no issue living, but such as can claim under the subsisting estate-tail, every consideration is favorable to the presumption, that no future marriage, nor issue of such marriage, was in contemplation; but, in the case of the existence of issue by a *prior* marriage, not in the line of succession to the supposed estate-tail, it seems extremely

(*s*) Prior on "Issue," 99.

difficult, to conceive the possibility of an intention in the testator, that the property should go over to his devisees, on failure of issue by his then wife, without any reference to his other issue previously born: every presumption militates against such a notion; while (*ex hypothesi*) the language of the testator is not agreeable to it; and its injurious results are, at the same time, not remedied by the rule as to implied revocations of wills, which serves that end, in the case of *subsequent* marriage and birth of issue. It seems, then, apart from authority, an inevitable conclusion, that, in the case supposed, the failure of issue contemplated cannot be referred solely to that line of issue, which is in the order of succession to the estate-tail, but must be held to refer to issue of the testator by any marriage; under which construction, the devise will, of course, be void for remoteness.

And, upon similar grounds, if, at the date of the will, there are issue living, of a marriage *subsequent* to that, the issue of which are inheritable to the existing estate-tail, it seems impossible, to exclude such issue from the contingency, as not being in contemplation; and, if included, the devise cannot have reference solely to the reversion; and if the devise be not a disposition of the reversion, and of the reversion, simply, it must, in the supposed case, be void for remoteness; for, *quoad* such of the issue referred to as are not entitled under the entail, the limitation is, in fact, dependent on an indefinite failure of issue, unsupported by an estate-tail, and is, consequently, invalid.

Lastly, it must be remarked, that if the failure of issue expressed in the will, be *less* extensive than that which is requisite for determining the estate-tail, and giving effect to the reversion, there can, it should seem, be no question as to the validity of the limitations. (†) Certainly, there can be none, as to the point of remoteness, if only it be established, that the devise may take effect as a disposition

And where there are issue living, of marriage *subsequent* to that, the issue of which are entitled under the entail.

If failure of issue mentioned in will *less* extensive than that which determines entail, yet devise, good, as disposition of reversion.

(†) See Prior on "Issue," 98.

of the reversion ; and it appears to be no impediment to such an operation of the devise, that the happening of the contingency expressed may, possibly, not suffice to bring the reversionary interest into possession. Clearly, the reversion would be well disposed of, without the express mention of any contingency, as that on which it depended, and would, moreover, effectually pass by any residuary gift, were the limitations not inconsistent with such a supposition ; and it would, therefore, be alike unnecessary and inconsequential, that the deficient specification of the contingency should operate to prevent the reversion passing, if the reference to the particular subject-matter were unambiguous ; or should, as a consequence of the devise not taking effect as a disposition of the reversion, expose that devise to the objection of remoteness.

As to limitations of reversions, in deeds.

It is to be observed, that the rule, which protects limitations after a general failure of issue, when the contingency is referrible to the determination of prior estates-tail, has not, as yet, been authoritatively extended to gifts in instruments *inter vivos* ; and it may, perhaps, be questioned, whether, *if nothing appeared on the face of the deed, to show that the interest limited was reversionary*, a Court would consider itself warranted, in travelling out of the deed, and looking at circumstances extrinsic, for the purpose of ascertaining that such is the fact. It should seem, however, that if the instrument itself showed, either by express recital, or otherwise, that the property was held only in reversion expectant on subsisting estates-tail, words of contingency, referring to a failure of the issue taking under the entail, would be regarded as, simply, words of description of the grantor's interest. But it is improbable, that any *inaccuracy*, in the mention of the contingency, would be cured, as in the case of wills, supposing the failure of issue, referred to by the deed, to be more *extensive* than that which will determine the estate-tail ; and, in such case, therefore, the limitations would be void for remoteness.

2. A second ground of exception to the rule, invalidating limitations on a general failure of issue, is afforded by the circumstance, of the subject-matter of the gift being a limited or partial estate or interest, which must, of necessity, determine before the expiration of the period prescribed by the Rule against Perpetuities. This, at least, is the general opinion. It will be proper, however, to postpone the consideration of the points arising on this branch of the subject, until the fitting occasion for its introduction, in connexion with all other classes of limitations within the range of the Rule against Perpetuities. The doctrine is only glanced at here, as necessarily included in the rules of exception at present under notice.

2. Subject-matter of gift being partial estate, not capable of continuance beyond allowed limits.

3. The third and only remaining exception from the rule, rendering void gifts of realty on a general failure of issue, is one of a very peculiar character. It may be well to preface its consideration by a few observations.

3. Interests expectant on base-fee, determinable on failure of issue, arising by matter *ex post facto*.

The subject bears affinity to the doctrine of base-fees. It will occur to the reader, that in the ordinary case of a tenant in tail levying a fine, or (under the modern system) executing a disentailing assurance, without the consent of the protector, and thereby acquiring a base-fee, determinable on failure of his issue, there never can be any danger of violation of the laws against perpetuity, inasmuch as the tenant in tail and his issue still retain the power of destroying the remainders and reversion, in virtue of the imaginary *scintilla* of right which resides in them, notwithstanding they may have effectually parted with all beneficial enjoyment of the property. It is true, this consequence of the statutory power of barring entails by fine, was in direct opposition to the rule of the Common law, which prohibited the limitation of a fee upon a fee ; (r) but, still, so far as any question of remoteness is involved, it is clear, that the existence of rights

(r) See Hayes Conv. 118.

in the nature of remainders and reversions, after base-fees *created out of estates-tail*, is entirely free from objection.

But, though the defeasibleness of remainders and reversions expectant on these base-fees rendered them unobjectionable in point of remoteness, it ever was, and still is, an undeniable rule of law, that an estate, analogous to a base-fee, cannot be *expressly* limited in a deed, with an *express* ulterior limitation, on the happening of the event, which is to determine the first fee, or on any other contingency. The rule of the Common law, which did not permit the limitation of a fee after or upon a previous fee, to use the language of Lord Coke, ^(s) had regard to the “ampleness and greatness of the estate, and not to the perdurableness of the same;” whereby a “diversity appeared between the quantity and quality of the estate.” In this latter case, therefore, no question of perpetuity could arise; for the Common law rule adjudged the supposed limitations void, upon a ground wholly independent of any such question. And this leads us to the point for observation, which is, that,

Although by express “act of the party,” no estate can be limited upon the determination of a base-fee previously granted, it may happen, that by matter *ex post facto*, a base-fee, determinable upon the general failure of issue of a person, and a future expectancy or right of reverter in absolute fee-simple, may co-exist in the same property, the latter being, at the same time, *indestructible by the owner of the base-fee, or any other person*. The nature of this rule will appear from the following observations of Lord Coke, who, in commenting upon the position of *Littleton*,—that a man cannot have a larger or greater estate of inheritance than fee-simple,—and after remarking, that this rule extended, as well to fees-conditional and qualified, as to fee-simples pure and absolute, says ^(t) :—“For this cause,

Lord Coke's
illustrations of
this rule.

(s) Co. Litt. 18 a.

(t) Co. Litt. 18 a.

two fee-simples absolute cannot be of one and the self-same land. If the king make a gift in tail, and the donee is attainted of treason, in this case, the king hath not two fee-simples in him, *viz.*, the ancient reversion in fee, and a fee-simple determinable upon the dying without issue of tenant in tail, but both of them are consolidated and joined together. And so it is, if such a tenant in tail doth convey the land to the king, his heirs and successors, the king hath but one estate in fee-simple united in him, and the king's grant of one estate is good, and so it was adjudged in the Court of Common Pleas. And yet in several persons, *by act in law*, a reversion may be in fee-simple, in one, and a fee-simple determinable, in another, by matter *ex post facto*; as, if a gift in tail be made to a villein, and the lord enter, the lord hath a fee-simple qualified, and the donor, a reversion in fee. But if the lord enfeoff the donor, now both fee-simples are united, and he hath but one fee-simple in him. But one fee-simple cannot depend upon another, *by the grant of the party*: as, if lands be given to A., and his heirs, ^(u) so long as B. hath heirs of his body, the remainder-over in fee, the remainder is void." And, again, in allusion to *Littleton's* rule, that where a villein purchaseth land in fee-simple, or in fee-tail, the lord of the villein may enter into the land, and oust the villein, and his heirs, for ever, Lord *Coke* remarks ^(v):—"By this it is apparent, that if lands be given to a villein, and the heirs of his body, the lord may enter and put out the villein, and the heirs of his body; for *quicquid acquiritur servo acquiritur domino*. And in this case, the lord gains a fee-simple, determinable upon the dying of the villein without heir of his body; and the absolute fee-simple remaineth still in the donor. And if the lord enter, and, after, infranchise the donee, and, after, the donee hath issue, yet that issue shall never have remedy, either by *formedon* or entry, to recover this land, by force of the statute of *donis*

(u) The words, *and his heirs*, are properly supplied by Mr. *Hargrave*.

(v) Co. Litt. 117 a.

conditionalibus; for that statute giveth remedy to the issues of the donee, that have capacity and power to take and retain such a gift; and the title of the lord remains, as it did at the Common law, for the statute restraineth acts done only by the tenant in tail. And so it is, if lands be given to an alien, and the heirs of his body, upon office-found, the land is seised for the king, afterwards, the king makes the alien a denizen, who hath issue and dieth, the king shall detain the land against the issue."

To the case here put by Lord *Coke*, is to be added that, (also hinted at by him,) of a forfeiture of an estate-tail for treason; where the crown becomes entitled to an estate in fee, determinable on failure of issue of the tenant in tail, upon which the possibility of reverter in fee is expectant.

Recent cases bearing upon the doctrine.

But this rule has received peculiar exemplification in several recent cases, which have occurred in reference to the effect of bankruptcy and insolvency upon powers of appointment, and in which, conflicting decisions were given, as to the point under notice, though the principle of Lord *Coke's* position was ultimately adhered to.

Case of *Badham v. Mes.*

In *Badham v. Mes.* (*w*) R. M. made a settlement of real estate, to the use (subject to a prior term) of himself for life, with remainder, to trustees, to preserve contingent remainders, with remainder, to the intent, that M. D., intended wife of R. M., might receive a rent-charge for her life, with remainder, to trustees, for a term of six-hundred years, and subject thereto, to the use of the sons of R. M., by M. D., as R. M. should by deed or will appoint, and in default of appointment, to the use of the *first and other sons successively in tail general*, with remainder, to the right heirs of R. M. R. M. subsequently became bankrupt, and the acting commissioners executed the usual bargain and sale, to the assignees under the bankruptcy, who sold the bankrupt's interest in the property, to one P. M. Many years afterwards, R. M. exercised the power contained in the settle-

(*w*) 7 Bing. 695; 1 My. & K. 32.

ment, by appointing the property to his eldest son *in fee*. A bill was filed for ascertaining the rights of the parties, a child of the appointee being plaintiff, and persons claiming under P. M., defendants. A case was sent to the Court of C. B., upon the effect of the appointment made by R. M.; and the Court certified, that the son of R. M. *did not take any estate in the property under the deed of appointment*, but that, under the original settlement, he took an estate-tail, in remainder expectant on the determination of the life-estate of his father. On return of the certificate, it was argued, against its confirmation, that although a fee mounted upon a fee was not allowable, yet, there was no objection to appointing an estate in fee, which might, *under certain circumstances*, become *inconsistent with a remainder-over*, but which, *until* those circumstances arose, was perfectly good. Sir John Leach, M. R., after remarking, that the omission of the Judges to assign reasons for their opinions prevented its being known, upon what grounds their certificate rested, (x) observed, that it was “conjectured, from an observation made by one of the judges in the course of the argument, that the Court of Common Pleas decided against the validity of the appointment, upon the ground, that by

(x) The writer cannot forbear introducing (however inapt the occasion,) the following just and forcible remarks of Sir John Leach, to which allusion is made in the text:—“The practice of the Courts of Common law, not to assign the reasons of their opinions upon cases sent from Courts of Equity, is a practice of modern introduction, and it is much to be regretted; being, at once, disadvantageous to the public, and inconvenient to the Court directing the case, which is deprived, by this practice, of the assistance it would derive from the opinion of the Court of law, were the grounds of such opinion disclosed. The object of directing a case, is, to know the opinion

of a Court of law upon the point in question; not, indeed, that such opinion is to be treated as a decision, but in order that the Court of Equity may be assisted in forming its judgment. It might well be expected, therefore, that the Court which directs the case should have the advantage of knowing the grounds, upon which the opinion of the Court of law is founded.” It is to be hoped, that the convenience of the Profession, and the credit of the Courts of law, will be consulted, by an early alteration of this practice, which seems as destitute of reason, as it is undeniably productive of uncertainty and confusion, in its results.

the execution of a power, no estate could be created, which would not have been valid, if limited in the deed creating the power. If, therefore, it were admitted, that the power of appointment continued in the bankrupt, notwithstanding his bankruptcy, and that the appointment in favor of the eldest son in fee might be construed as an appointment creating a base-fee only, and not prejudicing the remainder, which passed to the assignees under the commission, the appointment would, nevertheless, be void, because a limitation to that effect would have been void in the original deed creating the power, *inasmuch as the rule of law does not permit one fee to be limited after another, although the first fee be only a base or determinable fee*. This rule will support the opinion which has been formed by the judges of the Court of Common Pleas."

Observations
upon *Badham*
v. *Mee*.

The decision of Sir *John Leach*, in *Badham v. Mee*, therefore, (and, in all probability, the certificate of the Court of Common Pleas) affirmed, that, neither directly and expressly, nor by matter *ex post facto*, can a fee be limited to depend on a base-fee, determinable on the failure of issue of a person.

Case of *Hole*
v. *Escott*.

The next case, bearing upon the subject, though worthy of notice, did not call for a decision upon the particular point which occurred in *Badham v. Mee*. The case is *Hole v. Escott*, (y) where a husband, upon marriage, settled property, to the use of himself for life, with remainder, to the use of trustees, to preserve contingent remainders, with remainder, to the use of trustees, for a term of years, to secure a jointure for the wife, with remainder, to the use of such children of the marriage as the husband and wife jointly, or, in default of joint appointment, the survivor of them, should appoint, with remainder, in default of such appointment, to the children of the marriage *living at the decease of the survivor of the husband and wife*, equally, with re-

(y) 2 Keen, 444; 4 Myl. & Cr. 187.

mainder, to the right heirs of the husband. The husband became bankrupt; and afterwards he and his wife made a joint appointment in fee, in favor of two of the children of the marriage. The husband subsequently died, leaving his wife surviving; by which event, the estates limited to the children in default of appointment failed, for want of a particular-estate to support them; the wife having no freehold estate for her life under the settlement, and the interests of the children being contingent. As *the event turned out*, therefore, at the date of the bankruptcy, the bankrupt had an estate for life, with an *immediate remainder to himself in fee*, subject to his wife's rentcharge, and the term securing it. Any appointment by the bankrupt and his wife must necessarily have operated in derogation of the title of his assignees, who had acquired his life-estate, and the remainder in fee. There were, in fact, no intermediate estates in the children, capable of taking effect, in default of appointment by their parents. The inevitable conclusion, therefore, was, that arrived at by Lord *Langdale* and Lord *Cottenham*, viz., that the husband, after his bankruptcy, could not, by an execution of the power, take from his assignees, property, which had been once vested in them by the operation of the bankrupt laws.

The case of most importance upon this subject, is that of *Jones v. Winwood*, (2) the facts of which were these:—An estate was settled, to such uses as W. D., and F., his wife, should, during their joint lives, appoint, and, in default of appointment, to the use of W. D. for life, with remainder, to trustees, to preserve contingent remainders, with remainder, to the use of F. D. for life, with remainder, to trustees, to preserve contingent remainders, with remainder, to the use of the *first and other sons of W. D. successively in tail general*, with remainder, to the use of the *daughters as tenants in common in tail general*, with re-

Case of *Jones*
v. *Winwood*.

(2) 3 M. & W. 653; 10 Sim. 150.

mainder, to the use of W. D. in fee. Five years afterwards, W. D. took the benefit of the Insolvent Debtors' Act, and bargained and sold all his estate and effects to the provisional assignee, who subsequently conveyed the same to the creditors' assignee. Four years after the insolvency, W. D., and F. his wife, in execution of their joint power, *appointed the property to trustees in fee*, upon trusts for sale. The trustees afterwards concurred with the assignee in a sale of the property. The purchaser declined to complete his contract, on the ground, that W. D. had no power or right, after his insolvency, to concur with his wife in the execution of the joint power of appointment, reserved to them by the settlement, and that, therefore, the estates limited to the children were undivested. A bill for specific performance having been filed, a case was sent to the Court of Exchequer, upon the questions, whether the power was destroyed by the assurance executed by the insolvent to the assignee, and, if not so destroyed, what estate passed under the appointment. Before the Court of Exchequer, the case was professedly argued upon the point, of *Badham v. Mea* having been rightly decided, or not: the propriety of that decision was, in fact, directly called in question. The Court returned their certificate, to the effect, that the power was not destroyed, by the conveyance to the provisional assignee; and that by the appointment, *an estate in fee-simple* was conveyed, subject to the estate for life of the insolvent, and (on failure of the intermediate estates) *to the remainder in fee* to the insolvent, which had been, prior thereto, conveyed to the assignee of the insolvent's estate. On return of the certificate, it was argued for the purchaser, that the interest attempted to be created by the appointment was illegal: it was a base-fee, with a remainder-over; and as no estate-tail had been converted into a base-fee, the estate, to take effect on the determination of the base fee, could not be barred. In reply, it was said, that it had been settled for a series of years, that a base-fee might exist

in one person, and a remainder in fee, in another, to take effect on the determination of the base-fee. Sir *L. Shadwell*, V. C., after remarking, that the ground of the certificate of the Court of C. B., in *Badham v. Mee*, must be supposed to have been, really, that assumed by Sir *J. Leach*, said, that the bankrupt *did not*, in execution of his power, *appoint a base-fee*, so as to give ground for the objection that Sir *J. Leach* mentioned: that the bankrupt appointed in *fee-simple* to his son; and the law provided, that the *appointment should not affect the remainder in fee*, which the assignees had, previously, acquired, by virtue of the limitation in default of appointment; and that, therefore, the remainder in fee which the assignees took at first, *continued in them, unaffected by the exercise of the power*. His Honor further remarked, however, that though his own opinion was clear, he was free to admit, that, in the abstract, the certificate of the Court of C. B., confirmed by Sir *John Leach*, must create a doubt, when there was only opposed to it, the certificate of the Court of Exchequer. But, upon the evident understanding between the parties, as to the result of a decision in opposition to *Badham v. Mee*, the Court considered itself bound to decree a specific performance by the purchaser; which was accordingly done.

This decision, it is conceived, is in entire accordance with the rule laid down by Lord *Coke*, in the passages above cited: and they concur to establish, that although it is not allowable, to limit any estate, after a previous fee determinable on the death of a person without issue, yet, by matter *ex post facto*, or by operation of law, there may be a possibility of reverter expectant on such a base-fee. This base-fee, moreover, as it has been already observed, is not barrable, like a base-fee created out of an estate-tail; and the possibility of reverter, therefore, which is allowed to exist expectant upon it, being to take effect on an indefinite failure of issue, would, upon ordinary principles, be obnoxious to the laws against remoteness.

Observations
upon *Jones v.*
Winwood.

Mr. Preston's
confirmation of
the rule.

The view thus established is further sanctioned and confirmed, by the sentiments of two text-writers of note. Thus, Mr. Preston, (a) speaking of the effect of conveyances by persons having powers of appointment, supposes the case of an individual being tenant for life, with a power of appointment, with various remainders in strict settlement, with remainder, to himself, in fee, and a conveyance in fee by the tenant for life, and thereupon says,—“The power will be released as against the estate for life, and the remainder or reversion in fee; but while the intermediate particular-estates shall continue, the power (unless it be a power which requires its operation to embrace the entire fee) *may be exercised as against them*, so as to enable the donee of the power to defeat these estates, and confer an *ownership commensurate with these estates*, but after the particular-estates shall be determined, the power, and all estates derived from the exercise of the power, will cease to have continuance. These observations may be exemplified and illustrated, by supposing A. to be tenant for life; B., C., D., E., to be tenants for life, or in tail; and A. to have the remainder or reversion in fee, and also the power of appointing the fee-simple. A deed proceeding from A., and operating as a conveyance, and not as an appointment, will pass his several estates; namely, his estate for life, and estate in fee. The estates of B., C., D., and E., will continue; and during their continuance, the power of A. will be in force, as against them; and by a subsequent exercise of the power, either in favor of a stranger, or of the former grantee, A. may confer a title, *embracing that part of the ownership which was left in B., C., D., and E.*”

And Mr.
Sanders’.

So, again, Mr. Sanders (b) lays it down, that, “in the case of an estate being limited to A. for life, with remainder, to B. in tail, with remainder, to A. in fee, with a general power of revocation reserved to A., if A., by lease and

(a) 3 Essay on Abst. 78, *et seq.*

see ib. 435; and Burt. Elem. Comp.

(b) 1 Uses and Tr. 171, 172: and

68.

release, not executed according to the forms required by the power, convey to C. in fee, he cannot afterwards exercise his power, as to his own life-estate, and his remainder in fee; but the *power will remain as to the estate-tail of B.*"

Thus supported, there can, it is conceived, be little question, that the doctrine we have been considering is both sound in principle, and established in fact; and as little doubt can there be, that the operation of the rule is in contravention of (and, therefore, itself an exception to) the legally established limits, to the existence of remote, indefeasible expectancies in property; inasmuch as, by it, a future right may be dependent on the indeterminate event of a general failure of issue, although indefeasible by the owner of the base-fee, or any one else, save the person entitled thereto.

This doctrine clearly an exception to the rule, invalidating gifts on general failure of issue.

SUBDIVISION III.

The construction of words importing an indefinite failure of issue, occurring subsequently to an express gift to children or other issue.

The principle of referential construction, appropriated to this Subdivision, differs, in some degree, both from the restricted and indefinite interpretation of words, referring to a failure of issue. It is not, properly, a restrictive construction, for although it confines the failure contemplated, to a particular class or description of issue, that restriction not only has no necessary connexion with the decease of the ancestor, but also proceeds upon grounds, wholly distinct from those, on which the ordinary limited construction rests. Nor is it, strictly, an indefinite interpretation, for, as was just hinted, issue of a particular denomination are its

Nature of the rule of construction here considered.

objects, and a particular period, for ascertaining their existence or failure, is implied.

The principle of the rule in question cannot be better introduced to the reader's notice than in the following apt and felicitous statement of its principle by Lord *Cottenham*, in reference to a case calling for its application. "Provision," said his Lordship, (e) "is made for certain members of a class, answering a particular description, and then a gift-over is made on failure of the class. If it be clear, that the whole of the class were not to take, the gift-over, though made to depend on the failure of the whole class, will be construed to take place upon the failure of that description of the class who were to take; and, on the other hand, if it appear, that all the class were intended to take, although some only are enumerated, and the gift-over be, upon the failure of the whole class, the Court will adopt such a construction, as will extend the benefit, in the best way the law will admit, to the whole class." In other words, the construction in question either refers the words expressing failure of issue to a particular class or description of issue entitled under a prior gift, or raises, by force of the gift-over, an estate-tail in the ancestor, which may extend to the issue not included in the previous express limitation, on the ground of a supposed intention, that all the issue of the person named should fail, before any benefit accrues to the person, in favor of whom the gift-over is made."

Extent of the
present inquiry
concerning it.

This subject has engaged so largely the elaborate pen of the author of the *Treatise on Wills*, and the numerous authorities, bearing upon it, have been so fully detailed and discussed in that work, (f) that the writer will content himself with shortly stating the various rules and distinctions, which have been established, or are generally received, in reference to this class of cases. Without a brief review of

(e) In *Ellicombe v. Gompertz*, 3 Myl. & Cr. 127, (f) 2 Vol. pp. 361—406.

this kind, the treatment of this part of our subject might well be said to be crude and un-systematic : with it, little objection can be urged against the want of more minute disquisition, when the Profession is already acquainted with the results of the more accurate and beneficial investigations of a writer of established repute.

We shall not in this place make mention of gifts “in default of *such* issue,” following express limitations to children or other issue, for however prolific of question those words may have been, as between the first taker and his issue, in regard to the extent to which they affect those persons’ interests, it has seldom been contended, that they afford ground for the construction of an *indefinite* failure, *wholly irrespective of the class of issue entitled under the previous limitation* ; and it is now undeniably established, that these words refer only to the issue mentioned in the prior gift (*g*) ; which is their obvious and natural purport. Their consideration cannot, therefore, be material to the question of the *remoteness* of limitations depending on failure of issue.

1. The first rule which may be laid down is, that whenever a gift-over on failure of issue occurs subsequently to a direct limitation to *issue*, which is accompanied by expressions, whereby *issue* is plainly translated into *children*, the ulterior gift will be construed, as intended to take effect on a failure of *children*, and will, therefore, be free from objection, in point of remoteness. Thus, where (*h*) a testator gave his bank stock, to trustees, in trust for F. B. for life, and his funded property, to the same trustees, in trust for W. R. E. for life, and after his death, in trust, should he have *issue* of *his body, whether male or female*, to apply the interest, for the maintenance of such issue, if more than one, share and

Gifts “in default of *such* issue,” do not here require consideration.

1. Gift-over when *issue* in prior limitation is plainly translated into *children*.

(*g*) See 2 Jarm. Wills, 368, *et seq.*

(*h*) *Ellis v. Selby*, 7 Sim. 352. And see the similar cases of *Carter v. Bentall*, 2 Beav. 551 ; *Ryan v. Cowley*, L.L. & Co. 10 ; *Ridgeway v.*

Munkittrick, 1 Dr. & War. 84 ; in which the gifts over were, “in default of *such* issue.” *Vide*, 2 Jarm. Wills, 355, 357.

share alike, and, if only one, for the maintenance of such one, during his or their non-age, and on their respectively attaining twenty-one, to transfer to them, if more than one, in equal shares, and if only one, then to such one, the whole of the testator's funded property. The testator then directed his trustees, after the decease of F. B., to pay the dividends of his bank stock, to W. R. E. for life, and, after his decease, to apply the dividends and capital for the benefit of the *children or child* of W. R. E., *in such manner as the testator had before directed, respecting his funded property*. Should W. R. E. die *without issue, male or female, of his body* begotten, the funded property and bank stock to go over. Sir *L. Shadwell*, V. C., held, that, as to both funded property and bank stock, the words, referring to the failure of issue, male and female, of W. R. E., must be construed to mean, "child or children," the testator having clearly put his own interpretation on the prior gift to issue, male and female. This, it is true, was the case of a bequest of personalty; but that circumstance rather gives strength, than otherwise, to the construction adopted, as applied to limitations of realty.

2. Gift-over, when *issue* take by purchase under prior limitation, though not interpreted to mean *children*.

2. Again, it should seem, that whenever, under a prior limitation to *issue*, such issue take as *purchasers* (whether by force of superadded words of limitation, conjoined with a prescribed mode of distribution, inconsistent with the course of succession under an estate-tail raised in the parent, or otherwise, (i)) a subsequent gift-over, on *failure of issue* of the first taker, will be construed to refer to the class of issue who are the objects of the preceding limitation. (k) This follows from the extreme improbability, of the same word having been used in a different sense in successive

(i) The writer has not considered it either necessary or expedient, to enter upon the wide subject of disquisition, presented by the question, whether, under particular gifts to

"*issue*," that word operates as one of *purchase*, or of *limitation*.

(k) 2 Jarm. Wills, 345, 346, 364. And see *Leeming v. Sherratt*, reported 6 Jur. 663.

sentences ; at one time, as referring to *all* the descendants, however remote, of the person named, and, at another, as signifying only *children*, or, at most, *issue*, of any degree, *living at the decease of the parent*. (l) As it is an absurdity to construe, “issue,” indefinitely, in a limitation-over, and, at the same time, to give it a restricted meaning, in regard to a prior express gift, when there is nothing to aid the construction of the issue taking as purchasers, so is it unreasonable to say, that, although clearly controlled in respect to the previous limitation, it shall, nevertheless, retain its indefinite signification in the gift-over.

3. Whenever, on the other hand, under the preceding gift to the issue, such issue do *not* take by purchase, the limitation-over simply operates as a remainder expectant on the estate-tail raised in the ancestor, by virtue of, “issue,” in the previous gift, operating as a word of limitation. Thus, if a gift be made to A. for life, and after his decease, to the issue of his body, and the heirs of the body of such issue, and in default of issue of A., over to B. ; A. takes an estate-tail, with a remainder expectant thereon, to B. (m)

4. It is, further, well established, that words, referring to the general failure of issue of a person, occurring subsequently to a limitation to the *children* of such person, either in *fee-simple* or in *fee-tail*, are to be construed, as meaning, a default of the objects of the previous limitation. (n) And this construction obtains, notwithstanding that, by it, the issue of children dying in the testator's lifetime are entirely excluded from all benefit under the limitations. (o)

3. And when issue do not take by purchase under prior limitation.

4. Gift-over, after prior limitation to children, in fee-simple or in tail.

(l) As to this point, *vide* 2 Jarm. Wills, 352, 353.

(m) *Merest v. Hodgson*, 9 Pri. 556.

(n) *Ginger d. White v. White*, Wils. 348. *Goodright d. Docking v. Dunham*, Doug. 264. *Malcolm v. Tylor*, 2 Russ. & My. 416. *Turbuck v. Turbuck*, stated 2 Jarm. Wills, 375, *et seq.* *Sed vide Doe d. Todd v.*

Duesbury, 8 M. & W. 514, and observations upon that case, *supra*, p. 209.

(o) Mr. Jarman has remarked, in reference to this point, (2 Treat. Wills, 377, n.)—“But according to *Goodright v. Dunham* and *Malcolm v. Taylor*, a child, on its birth, or at the death of the testator, takes a vested fee, which, of course, in the event of

Fee curtailed to estate-tail, if children are to take successively.

It is to be observed, that if the limitation be, to the children, *successively*, in fee, the word, "heirs," in the gift to them, will be controlled to mean, *heirs of the body*, by which construction, the children will take *estates-tail*, in the mode intended. (p)

Effect of word "leaving" occurring in limitation-over, after prior gift to children.

It seems to be a question, in reference to gifts of this kind, whether, if the words used in a limitation-over be, "die without *leaving* issue," the contingency contemplated be, the *entire* failure of the objects of the preceding gift, or whether the words refer to a default *at the time of the death of the first taker*; whether, in fact, the word, "leaving," is to be read in the sense of, "*having had*," or not. (q)

It is obvious, that were there no express gift to the children, this word, according to all established rule and analogy, would be merely equivalent to, *having*, and would not, therefore, imply any survivorship of the death of the first taker. But when the general signification of the term, *issue*, cannot have place, by reason of its being referred to the objects of the preceding gift, there does not seem any objection to the word, *leaving*, also having a more restricted interpretation than it usually bears, inasmuch as its extended meaning, in ordinary cases, is given, to render it more accordant with the indefinite signification of, *issue*. Doubtless, a construction, which renders the interests of the children dependent on their surviving the parent, is open to the objection

that child subsequently dying in the *lifetime of the tenant for life*, leaving issue, would descend to such issue, if not otherwise disposed of." It is difficult to see the pertinency of this observation, to the question above noticed. Undoubtedly, the issue of children, dying in the lifetime of the tenant for life, succeed to their parents' shares; but it is as questionless, that the referential construction deprives the issue of children dying before the testator, of all

benefit whatever from the gift to the children, or any other gift.

(p) 2 Jarm. Wills, 388. Prior on "Issue," 138. *Lewis d. Ormond v. Waters*, 6 East, 336, is not cited as an authority, as the limitation-over, in that case, was, "in default of such issue."

(q) See *Tarbut v. Tarbut*, *supra*; and 2 Jarm. Wills, 375, 377, 378. An instance of this kind of gift occurred in *Doe d. Todd v. Duesbury*, *ubi supra*. See Appendix II.

of inconvenience ; but it is difficult to see, with a late learned writer, (r) how any argument against it is properly deducible from general analogy.

5. When the gift to the children or issue is *for life* only, and it is followed by a limitation-over, on failure of issue of the parent or ancestor, the effect of the limitations is, to raise an *estate-tail* in such parent or ancestor, *in remainder* expectant on the determination of the life-estates, previously limited to his children or issue. (s)

5. Gift-over, after prior limitation to children for life.

6. When the limitation to the children is, in tail, but it is made to *such children only as shall survive the parent*, an estate-tail will be raised by implication in such parent, in remainder expectant on the estates-tail of the children, so as to include the descendants of a child dying in the parents' lifetime. (t)

6. When gift to children is in tail, but contingent on their surviving the parent.

7. It is, further, a rule, that when the words, "in default of issue," occur, after an express gift to *sons* in *tail-male*, and *daughters* in *tail-general*, those words are referrible to such sons and daughters, and will not, therefore, have the effect

7. When prior limitation to sons in tail-male and daughters in tail-general.

(r) 2 Jarm. Wills, 378.

(s) *Parr v. Swindels*, 4 Russ, 283. *Sed vide Wright v. Leigh*, 15 Ves. 564; *Bennett v. Lowe*, 5 Moo. & Pay. 485; 7 Bing. 535; *Doe d. Garrod v. Garrod*, 2 B. & Ad. 87: the first of which cases is clearly not an authority, the fee having passed to the children under the word "estate:" the second is open to observation, as having been decided, without *Parr v. Swindels*, or the construction adopted in it, being presented to the notice of the Court: and in regard to the last of these three cases, it is to be observed, the decision, that the parent took an estate-tail, was, in all probability, grounded on the force of the gift to the next or eldest issue male, (notwithstanding the early case of *Lovelace v. Lovelace*, Cro. Eliz. 40,) without reference to the limitation-over. There was, also,

a further difference between *Parr v. Swindels* and *Wright v. Leigh*, viz., that, in the former, the limitation was to children, *equally*, while, in the latter, it was, to the first and other sons, *successively*; which last mentioned circumstance was, perhaps, somewhat more favorable to the implication of an estate-tail in the parent. See observations on these cases, 2 Jarm. Wills, 329 n., 388, 389, 391, 405; Prior on "Issue," 134, 141.

(t) *Doe d. Gallini v. Gallini*, 5 B. & Ad. 621; 3 Ad. & Ell. 340. It will be observed, the writer does not draw so extensive an inference from this decision, as Mr. Jarman (see 2 Treat. Wills, 397, 399,) : the cases of *Bamfield v. Popham*, and *Blackborn v. Edgley*, cited *infra*, seem directly opposed to that learned gentleman's conclusion.

of raising an estate-tail in the parent, so as to include daughters of sons. (u)

8. Prior gift to sons in tail-male.

8. Upon the like principle, it should seem, that if the previous limitation be, to *sons in tail-male only*, without any gift to daughters in tail-general, or otherwise, words, signifying failure of *issue* of the parent, are to be construed, as merely referential to the objects of the preceding limitation, and as not, therefore, operating to vest any estate-tail in the parent. There is not, however, any express authority as to this particular case.

9. Difference, in the case of trusts executory.

9. But this referential construction will not be adopted, to the same extent, in regard to *trusts executory*, which, as being less precise and technical than ordinary limitations, are construed more liberally, and with a greater regard to probable intention. Therefore, where (v) there was a testamentary direction to settle upon *issue* of the testator's son by a particular marriage, in strict settlement, and an ulterior gift, on death of the son *without issue*, it was decreed, that a remainder in tail-general should be inserted in the settlement, after the limitations to the sons of the marriage.

10. Prior gift to first and other sons in tail-male, and limitation on failure of issue male.

10. It is also clear, that in the case of a limitation to *first and other sons* successively in *tail-male*, with a gift-over, on failure of *issue male* of the parent, the latter words will be held to refer to the line of sons taking under the previous limitation. (w)

11. Limitation-over after prior gift to eldest son in fee or in tail.

11. When there is a gift to an *eldest son* only, either in *fee-simple*, or in *tail*, or in *tail-male*, and a subsequent limitation-over, on failure of *issue* or *issue male* of the parent, the settled construction is, that the son takes an estate-tail, or an estate-tail-male (when so limited), with a remainder expectant thereon, to the parent, either in tail or in tail-

(u) *Blackborn v. Edgley*, 1 P. Wms. 600. *Morse v. Marquess of Ormonde*, 5 Madd. 99. *Sed vide* the observations of Mr. Prior, in his Treatise on "Issue," 136.

(v) *Allanson v. Clitherow*, 1 Ves. sr. 24.

(w) *Bamfield v. Popham*, 1 P. Wms. 54, 760; 2 Vern. 427, 449.

male, according to the terms of the limitation-over. (*x*) It will be observed, in reference to gifts of this class, that if the limitation be, to the eldest son, in *fee*, that interest is necessarily cut down to an *estate-tail*, in order to vest a remainder in tail in the parent : (*y*) and the like modification of interest takes place in every case of an express gift to issue in fee, where the construction of the words introducing the limitation-over is not exclusively referential.

12. Again, it has been determined, that when there is a previous gift to a *certain number* of sons only, successively in *tail-male*, with a limitation-over, on failure of *issue male* of the parent, an *estate-tail-male* in remainder must be raised by implication in such parent, so as to let in all the issue male he may possibly have, and who are not expressly provided for by the prior limitation. (*z*) And the like rule would, doubtless, hold, in the case of a gift-over on failure of *issue*, after a prior limitation to a certain number of sons in *tail-male*; the remainder in tail, in that case, being *general*, to all the issue, and not *special*, to the partial line of issue, in which the objects of the preceding gift are included. In such a case, the referential construction which obtains, when the gift-over on failure of *issue* occurs after a limitation to *all* the members of a particular class of *partial* issue, cannot have place; because, if an *estate-tail* is to be raised at all, for the purpose of including all possible issue of the same description with those taking under the previous limitation, that estate must be commensurate with the issue, by force of reference to whom it is raised; that is, in the supposed case, the whole line of issue. Upon the same principle, too, it should seem, that if the previous gift extended only to vest estates-tail in a definite number of

12. When previous gift to definite number of children.

(*x*) *Stanley v. Lennard*, 1 Eden, 87. *Doe d. Bean v. Halley*, 8 T. R. 5. *See vide Marsh v. Marsh*, 1 Bro. C. C. 294; where, however, the subject-matter was *personalty*.

(*y*) *Doe d. Bean v. Halley. supra.*

Prior on "Issue," 139, 140.

(*z*) *Langley v. Baldwin*, 1 Eq. Ca. Abr. 185, pl. 29; 1 Ves. sr. 759. *Attorney-General v. Sutton*, 1 P. Wms. 754.

children, a limitation-over, on the death of the parent *without issue*, would have the effect of raising an estate-tail in such parent, in remainder expectant on the estates of the children.

13. When issue taking under preceding gift must attain a certain age.

13. The referential construction is not adopted, when the previous gift is accompanied by restrictions, as to the issue taking under it *attaining a specified age*. Therefore, where (a) a testator devised property to such *son* of his, *as should first attain twenty-one*, when he should attain such age, and his heirs, but in default of a son attaining such age, to a daughter, *if she should attain twenty-one*, and her heirs, and if he (the testator) should depart this life *without leaving issue*, over; it was held, that the restriction, of the issue attaining a specified age, could not be imported into the contingency, on which the limitation-over was to take effect, so as to give rise to a referential construction; and that that limitation, therefore, failed.

14. When express gifts to issue only made in contingent events.

14. Again, it is settled, that when the previous limitations to the issue are made in certain *contingent events* only, which may not occur, or if estates are not directly given to the issue, in such a manner as to exhaust the whole subject-matter, an estate-tail will be given by implication to the parents, in remainder expectant on the estates conferred by the previous limitations. (b)

(a) *Doe d. Roe v. Lucraft*, 1 Moo. & Sc. 573; 8 Bing. 386. And see 2 Jarm. Wills, 380. *Sed vide* observations of Mr. Prior, on that case, in his Treatise on "Issue," 139, 142, 143.

(b) *Franks v. Price*, 6 Scott, 710; 5 Bing. N. S. 37; 3 Beav. 182. Mr. Jarmen (2 Treat. Wills, 382, n.) seems to consider, that the decision in this case may, possibly, afford some countenance to the objectionable doctrine, apparently affirmed by the cases of *Doe d. Tenny v. Agar*, 12 East, 252, and *Romilly v. James*, 6 Taunt. 263, (that an estate-tail may be raised

by implication, in a person not taking any previous estate,) and noticed *supra*, p. 185, n. But it is submitted, whether it has not escaped the learned writer's observation, that in the very event which happened, a prior limitation in the will had given the person who was held to take an estate-tail, a *life-interest* in the *whole*, and that, therefore, there was no objection to an estate-tail in the *entirety* being raised in that person, by force of the gift-over, although he, originally, took only a *moiety* of the property for life.

15. When, to the contingency of the parent dying without issue, is superadded that, of a failure of issue of the *issue* taking under the previous gift, the construction is, that the children take estates-tail, with remainder in tail to the parent, (supposing the implication of such a remainder admissible according to the previous rules)(*c*). It may be observed, however, that these superadded words are rejected as nugatory, when there is *no express gift* to issue, which may be affected by them, and they are, therefore, of no force in putting a construction upon words referring to a failure of issue. (*d*)

15. When there is a superadded contingency of *issue* dying without issue.

But it is no argument in favor of this construction, that a gift-over, on failure of issue of all the *children* of the parent is the same thing, as, a limitation on failure of issue of the parent himself, and that, therefore, it will suffice to show, that the ulterior limitation is not to take effect until failure of all the line of descendants of the latter: for there may be issue, incapable of taking under estates-tail raised in the *children*, by reason of the death of their parent, (that is, one of the children,) in the testator's lifetime; but during whose existence, there can, of course, be no failure of issue of the ancestor. (*e*)

16. It seems to be established, that if the gift to the issue be *posterior, in the order of the limitations*, to that, on failure of issue of the parent, the referential construction will not be admitted. Thus, where (*f*) realty and personalty were bequeathed to the testator's daughter, C. H.; *but in case of her death without lawful issue*, over; and the testator subsequently requested his friends, C. and S., to

16. Gift-over preceding limitation to issue.

(*c*) *Doe* d. *Barnard* v. *Reason*, cited 3 Wils. 244. *Jones* v. *Legg*, 9 Mod. 461; S. C. *sub nom.* *Ives* v. *Legg*, 3 T. R. 488, n.

(*d*) See *Franks* v. *Priest*, *ubi supra*.

(*e*) See judgment in *Doe* d. *Todd* v. *Duesbury*, 8 M. & W. 533, *et seq.*

(*f*) *Campbell* v. *Harding*, 2 Russ.

& My. 390; S. C. *sub nom.* *Candy* v. *Campbell*, 8 Bligh. N. S. 469. And see the forcible observations of Mr. *Prior*, on this decision, in reference to another ground on which it was rested, in *Treatise on "Issue,"* 153, 154.

be guardians of C. H. ; and directed, that if she married, "it must be with their consent, and the property to be solely settled on *herself and children*, and in no way charged or alienated." It was argued, that the words, "in case of her death without lawful issue," must be construed, as referring to such issue, as would have taken under the settlement directed by the testator, in case of the marriage of the daughter, and that, therefore, the gift-over of the personalty was not void for remoteness. It was, however, held, both in the Court of Chancery, and in D. P., that the words in question must be read, as referring to an indefinite failure of issue ; and, as it should appear, chiefly (at least, in the superior tribunal,) upon the ground, that there was no authority for extending the referential construction to cases, where the express limitation to the issue occurred *after* the gift-over.

17. When there is no preceding gift to the parent.

17. Again, it appears to be a rule, that if there be no gift to the person, on failure of whose issue, the limitation-over is to take effect, the referential construction obtains in the same manner, as if the gift to the children or issue had been preceded by such a limitation. (*g*) Indeed, it should even seem, that in *every* such case, this construction must be adopted, because, as there is no prior estate in the parent, the very foundation for the implication of an estate-tail in him, either immediate or by way of remainder, fails. There is, however, the alternative, of rendering the ulterior gift void for remoteness, by rejecting both the referential construction, and that, of an implied estate-tail, altogether. But this would be an extreme doctrine, which, the tendency of modern adjudications does not lead us to suppose, the Courts would very readily adopt.

18. When the estate of the parent is not freehold or is

18. Since the operation of words, referring to the failure of issue of a person, to raise an estate-tail in that person, when the intermediate gift to the issue embraces only a

(*g*) *Salkeld v. Vernon*, 1 Eden, 64 ; bequest of *personalty*. which was, however, the case of a

portion of those intended to take, is entirely founded on the *Rule in Shelley's case*, (*h*) it is clear, that the person, in favor of whom the estate-tail is to be implied, if at all, must have an estate of a nature, which would admit of the application of that rule, in the case of *express* limitations to a person, and, afterwards, to the heirs of his body, or his issue. (*i*) Now, it is an indispensable condition of the application of the rule in question, that the ancestor should, first, have an estate of *freehold*, under the *same instrument* as that containing the limitation with which it coalesces, and, next, that that estate of freehold should be *identical in nature* or character with that, limited to the heirs of the body or issue; that is, they should be, either, both legal, or, both equitable. (*j*) It follows, therefore, that if the gift to the parent or ancestor be, for a *term of years* only, or if the freehold limited to him be legal, while all the ulterior gifts are equitable, or the former, equitable, and the latter, legal, no estate-tail can be raised by implication in the first taker, under any of the foregoing rules, and the validity of the limitation-over will, consequently, depend upon the circumstance, of the failure of issue, on which it is to take effect, being strictly and exclusively referential to the issue who are objects of the preceding gift. (*k*)

not of the same nature as the ulterior estates.

19. Lastly, it is to be observed, that when the words introducing the limitation-over are, "dying without children," (which, it has been formerly said, are, in ordinary cases, equivalent to, "dying without issue,") the construction of the limitations will generally coincide with that, which would have obtained, had the word, *issue*, instead of, *children*, been used. Probably, however, these words would exercise some peculiar influence upon a case of doubtful construction,

19. When expression introducing limitation-over is, "die without children."

(*h*) 2 Jarm. Wills, 247.

(*i*) See Prior on "Issue," 155.

(*j*) F. C. R. 27, 52, 58. 2 Jarm. Wills, 243, 244.

(*k*) See *Mogg v. Mogg*, 1 Mer.

654; where, however, the question seems rather to have been one of the application of the *Cy-pres* doctrine; as to which, *vide infra*.

as to issue taking by purchase, or otherwise, under a prior gift; as, in such a case, they might not be immaterial to show, that, "issue," was not intended as a word of limitation. For all purposes of the referential construction, however, it is conceived, the words in question are of equivalent import to, "dying without issue." And, as a corollary to that proposition, it should also seem, that whenever an estate-tail would be raised by implication, by force of the last-mentioned expression, a similar effect will attend the use of the synonymous phrase. Any force that may be allowed to the word, "children," as distinguished from that which belongs to, "issue," will always be influenced so materially by the particular circumstances of each case, that it is impossible to lay down any positive rules, as to what will suffice to give the former word a more restricted construction, than that usually borne by the latter.

Extent to which these rules are to be received.

The rules and distinctions, above stated, are not advanced, as all and entirely clear and unquestionable, but, rather, as furnishing the general outline of a system, which the fruitful source of litigation furnished by the words, "die without issue," has enabled the Courts to raise, with some appearance of harmony and proportion. Nor has it, in general, been here attempted to anticipate occasions of further refinement and distinction, to which the ingenuity, caprice, ignorance, or carelessness, of testators may, from time to time, give rise. Since the dispositions of self-taught lawyers are as frequently destitute of grammatical sense, as, ever-varying and fantastic, it is impossible to declare, from well-educated principle, or justly-formed analogy, under what particular rule, distinction, or exception, supposable cases might take rank.

Not yet extended to limitations in deeds.

It only remains, to make an observation, similar to that, with which there has been occasion to accompany most of the inquiries, occupying the previous Subdivisions, *viz.*, that actual decision on the various points here noticed is confined to cases of testamentary limitations; and that no

analogy can be deduced from such existing authorities, in favor of the extension of the like rules, to gifts by instruments *inter vivos* : as to which, any question that may occur will be of the first impression.

SUBDIVISION 4.

The operation of 7 Gul. 4 and 1 Vict., c. 26, s. 29, upon testamentary limitations of real estate, to take effect on a dying without issue.

Our inquiries, hitherto, have embraced the whole subject, of limitations of real estate after or upon a failure of issue, anterior to or irrespectively of the alterations introduced, in reference to these limitations, by the recent statute, 7 Gul. 4 and 1 Vict., c. 26, the operation of which commenced with the year, 1838, but only as to all wills dated or republished subsequently to the year, 1837. It now remains, to point out the nature of the new enactment, and its effects and general bearing, as well immediate and direct, as remote and consequential, in reference to the subject before us. It is necessary to premise, however, that the statutory provisions we are to consider, are entirely confined to *wills*; and, therefore, all that has been said in relation to limitations in deeds, must be considered, as applicable in its full extent, at this present time, notwithstanding any difference we may have to notice, in regard to limitations in wills. Preliminary remarks.

It will facilitate the inquiry, if the words of the act 7 Gul. 4 & 1 Vict. c. 26, in review before us; and too much attention can be given to them, important as they are, in their relation to our present subject. The 29th section of the act is to (the section with which we are principally con

is to the following effect :—“ Be it enacted, that in any devise or bequest of real or personal estate, the words, ‘ die without issue,’ or, ‘ die without leaving issue,’ or, ‘ have no issue,’ or any other words, which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean, a want or failure of issue in the lifetime, or at the time of the death, of such person, and not, an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate-tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate-tail to such person, or issue, or otherwise : provided, that this act shall not extend to cases, where such words as aforesaid import, if no issue described in a preceding gift shall be born, or if there shall be no issue, who shall live to attain the age, or otherwise answer the description, required, for obtaining a vested estate, by a preceding gift to such issue.”

To apply the provisions of this enactment, in the order adhered to in our previous consideration of the old law :—

Effect of new rule of construction, on devise to A. in fee, and on death of B. without issue, to C. ;

1. If land be devised to A., and his heirs, provided that, if B. die without issue, or without having issue, or without leaving issue, then, to C. ; the limitation to C. will be good ; the event described,—*viz.*, the failure of B.’s issue,—being, by force of the 1 Vict. c. 26, limited to happen, either before or at the decease of B., and, therefore, within the period prescribed by the Rule for prevention of Perpetuities. And if B. die leaving a child or other issue behind him, though there be, afterwards, an extinction of the line of issue, the specified event does not receive its fulfilment, and the ulterior limitation, consequently, fails.

—to A. in fee, and on his death without issue, to B. ;

2. If there be a devise to A. and his heirs, and if he die without issue, to B., and his heirs, the failure of issue being, by the new statute, confined to the death of A., the limitation to B. is good, as an Executory devise, to take effect in the event of the death of A., without leaving issue living at

that time. (m) It will be perceived, therefore, that the doctrine of implication of estates-tail, is now entirely abolished, as to wills embraced by the new enactment, except in those cases, where an intention, to use the words importing dying without issue, as signifying an indefinite failure of issue, is plainly evinced. Not only is the *necessity* for the implication of an estate-tail, in the case under consideration, removed, but that construction is also rendered *impossible*, by the confined interpretation now to be put upon words indicating a failure of issue, under the provisions of the new law. The failure of issue, co-extensive with the limits of an estate-tail, is a general or indefinite failure; in other words, the failure, which involves the natural extinction of an entail, embraces the whole line of issue inheritable to the first purchaser. If, therefore, the meaning, either proper or forced, of words importing a dying without issue, confine the failure intended to the death of the devisee, it is plain, (as was formerly observed,) (n) that there is no opening for the raising an estate-tail by implication in the person, the failure of whose issue is in question, from the mere circumstance, of the manifestation of an intention, that if such failure happen within a limited period, another person shall succeed to the property. As it is, however, the mode of interpretation which has rendered impossible, any resort to the old rule of construction, in the case supposed, has also removed all *necessity* for it, so far as concerns the harmony and support of the several limitations, the effecting which, was the original moving cause of the adoption of the rule.

3. And so, with respect to a devise to A., and his heirs, after the death of B. without issue, neither A. nor B. being the testator's heir-at-law, and no preceding estate being given to B.; the limitation to A. is good, the failure of B.'s issue being restricted to his death.

—to A. in fee,
after the death
of B. without
issue;

4. Again, suppose a limitation, similar to the last, but

—to A. in fee,
after the death

(m) 1 Jarm. Wills, 496. Shelf. (n) *Vide supra*, p. 187.
Wills, 320.

of B. without
issue, A. or B.
being testator's
heir ;

with the difference, of A. or B. being the testator's heir. The rule (as we have seen) ^(o) applicable in such a case, in regard to wills not within the operation of the new statute, is, that B. takes an estate-tail by implication ; it being supposed, in the one case, that the testator could not give to a person, at a future specified period, what devolves to him by act of law, immediately, without intending to dispose of it in the mean time ; and, in the other, that by limiting the property over, on the death of his heir without issue, the testator showed an intention, that in the meantime it should belong to him, as the person on whom the law casts the inheritance, in default of any disposition of it, *secus*. But under the new law, the failure of issue is restricted to the death of B., and an estate-tail cannot, therefore, be raised in him, in either of the cases supposed. Yet, as it is manifestly absurd, in the case of the devisee being the heir, not to provide for the destination of the property, until the period fixed for him to take it, it would seem, that an estate must be implied in the ancestor, on failure of whose issue the heir is to take ; and, as the construction of an estate-tail is now impossible, that estate must be a fee-simple. ^(p) In the other case, *viz.*, that of *the person, on failure of whose issue the devise is to take effect*, being the testator's heir, the like rule must hold. In both cases, in a word, (to revert to the illustration,) B. takes a fee-simple, subject to an Executory devise in favor of A., in the event of his (B.'s) dying without issue living at the time of his death.

—to A. for
life, and after
his death
without issue,
to B. ;

5. Further, let it be supposed, that property is devised to A. for life, and if he die without issue, to B. in fee. Prior to the new enactment, we have seen, that the effect of such a limitation would be, to enlarge the life-interest of A. into an estate-tail, and to give place to the limitation to B., as a remainder expectant upon it. But, as the words importing a failure of issue are now cut down to a dying without issue

(o) *Vide supra*, p. 181.

(p) 1 Jarm. Wills, 498.

living at the death, there is no ground for the enlargement of the life-estate; because, as before remarked, to create an estate-tail, a general or indefinite failure of issue must be intended: while, at the same time, there is no express gift to the issue. The effect, therefore, of such a devise, under the new statute, will be, to confer on A., an estate for life only, whether he has issue or not, with a contingent remainder to B., to take effect, in the event of A.'s dying, without leaving issue living at his decease. (q) It may be questioned, indeed, whether, in this instance, the alteration introduced by the recent act be, in all respects, a wise or beneficial one; for, while the ulterior gift is postponed till the failure of issue of the tenant for life, such issue not only take nothing, by reason of the want of an express devise to them, but, also, the estate for life is rendered unsusceptible of enlargement into an estate-tail, under which the issue might inherit. It has not, however, been *decided*, whether, in the alternative event, of the *existence of issue* at the decease of the tenant for life, any estate can be raised by implication in their favor, and their exclusion from all benefit of the devise cannot, therefore, be treated as perfectly clear; but the better opinion, and that most accordant with principle, seems unfavorable to such an implication. (r)

6. The next species of limitation, the construction of which undergoes a change, by force of the new statute, occurs in the case of a devise to A., *indefinitely*, (that is, for no express estate,) and in the event of his death without issue, to B. Under the former law, it will be remembered, (s) the

—to A., indefinitely, and after his death without issue, to B.; and, therein, of the 28th section of 1 Vict. c. 26;

(q) 1 Jarm. Wills, 497. Shelf. Wills, 321. See *Lethieulster v. Tracy*, 3 Ark. 774, 793; and observations of Lord Gifford, M. R., in *Greene v. Ward*, 1 Russ. 264; in reference to a similar devise, prior to 1 Vict. c. 26.

(r) 1 Jarm. Wills, 490, 497; and see *Greene v. Ward*, *ubi supra*. And in the case of *Ranelagh v. Ranelagh*, 2 My. & K. 441, (stated and observed

upon, *infra*;) the issue of legatees for life of a personal fund claimed to take by implication as purchasers; but the claim seems to have been treated as unsustainable. *Ex parte Rogers*, 2 Madd. 449, leads to a different conclusion. See *Clarke v. Lubbock*, 1 You. & Coll. N. C. C. 492. Also stated and observed upon, *infra*.

(s) *Vide supra*, p. 179.

effect of such a devise is, to raise an estate-tail in A., with remainder to B., in the same manner, as in the case of a limitation of an express life-estate; and, were there nothing more in the recent statute applicable to the case of an indefinite devise, the *new* construction of these two classes of limitations would be also identical. But that statute effects an important alteration, in regard to the nature and effect of an indefinite devise, which occasions a material difference, between it and the devise of an express life-estate, in reference to the operation upon them of the provisions of the statute, relative to the construction of words importing a failure of issue. The 28th section of 1 Vict. c. 26 enacts, that "where any real estate shall be devised to any person, without any words of limitation, such devise shall be construed to pass the fee-simple, or other the whole estate or interest, which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will." An indefinite devise, therefore, must be read, as a devise in fee-simple; and, that being the case, it is immediately ascertained, that, under a devise to A., without words of limitation, and if he die without issue, to B., the operation of the new statute is, to vest the fee-simple in A., with an Executory devise to B., in the event of A. dying, without leaving issue living at his decease. (t)

— to A. in fee,
and if he and
B. die without
issue, to C.;

7. Yet again, let us suppose the case of a devise to A., and his heirs, and if A. and B. die without issue, to C., and his heirs. This is a case, in which, as to wills made prior to the commencement of the recent statute, the ulterior limitation is void, and not capable of being supported by the implication of estates-tail, co-extensive with the lines of issue, whose failure is to give it effect, by reason of the want of an express estate in one of the ancestors named. (u) The effect of the new enactment, in the case put, is, to vest the fee-simple of the devised property in A., subject to an Execu-

(t) Shelf. Wills, 321.

(u) *ide supra*, p. 185.

tory devise in favor of C., in the event of the deaths of A. and B., without leaving issue living at the time of their respective deceases.

8. It must be remembered, that the grand effect of the new enactment is, to bring all Executory limitations in wills, depending on the contingency of the death and failure of issue of a person, (whether taking a preceding estate, or not,) within the limits prescribed by the Rule for the prevention of Perpetuities, where the person, the failure of whose issue is to give effect to the devise, is *in esse* at the death of the testator; whereas, formerly, (as we have before seen,) the inevitable fate of such limitations (unless the failure of issue was confined to the death of the ancestor, or unless the case was such, as to admit of the implication of an estate-tail in him,) was, their invalidity on the ground of remoteness.

Chief result of new rule, to remove objection of remoteness, to gifts on failure of issue.

With reference, indeed, to the qualification, that the person, on the contingency of whose death without issue, the devise is to operate, must be in existence at the death of the testator, a late writer (v) has advanced the position, that the Rule against Perpetuities will not be violated, if the ancestor be existing at the death of the testator, *or necessarily come in esse within twenty-one years afterwards*. In laying down such a doctrine, it is submitted, that the learned gentleman has overlooked the terms of the Rule against Perpetuities, which are, that executory estates must be so limited, as to take effect, if at all, within the period of a life or lives *in being*, and the term of twenty-one years afterwards, with the superadded months, allowed in case of infancy: the term of twenty-one years cannot, it is conceived, be taken, *in the first instance*, as a period, within which the life or lives, constituting the main term of suspense, may come *in esse*. If the lives are in existence, then, indeed, it matters not, whether the term of twenty-one years precede or follow

But the person, whose issue is to fail, must be *in esse* at death of testator.

(v) 1 Jarm. Wills, 498.

the lives ; for though the duration of the period of contingency, in each case, may not, in the end, perfectly coincide ; in neither, will that period exceed lives in being and twenty-one years. Moreover, it would be difficult to predicate of any person, not in *rerum natura*, that he will *necessarily* come *in esse*, within any specified period, as required by the terms of the position alluded to ; and unless it be a matter of *certainty*, that the contingent event will happen, if at all, within the period fixed by the Rule against Perpetuities, we know, that the limitation depending upon it is void.

No estate-tail can be raised by implication under new rule ; and ulterior gift, therefore, in-destructible.

9. A further consequence of the new mode of construction is, that, whereas, under the former rule, in all cases which admit of the application of the doctrine of implication of estates-tail, (namely, where the person, whose issue is referred to, takes some estate under the will, or, if he take no estate, where he, or the devisee, fills the character of heir-at-law of the testator,) the executory limitation (in its character of a remainder,) is liable to destruction by the tenant in tail, such limitation, under the new mode of construction, is (with the exception next noticed) exempted from that or any similar liability, by reason of its taking effect, as an Executory devise limited upon a preceding fee-simple. With respect, indeed, to the case of the devise of an express life-estate, with a limitation, in the event of the death of the tenant for life without issue, as the executory limitation, under the new mode of construction, takes place as a contingent remainder, it is, of course, liable to be defeated by any of those acts of the devisee for life, which usually occasion the destruction of contingent remainders. And as the altered construction, by precluding, and preventing the necessity of, the implication of estates-tail, preserves the executory limitation from the destructibility consequent thereupon, so does it render the estate of the first taker absolute, in the alternative event, of his dying, leaving a child, or other issue, behind him.

Enactment does not extend to

10. One species of limitation must be noticed, which is, obviously, without the purview of the recent enactment ;

viz., a devise upon the failure of issue of a *person deceased*. The antecedent death of the ancestor referred to forbids the application of the newly-enacted rule of construction, in such a case, because a contrary notion induces the absurd consequence, of the testator being made to speak of an event, as contingent and futurely, the happening or not happening of which would, by the construction in question, have been previously ascertained. In the case supposed, therefore, if no estate be given to, or be already vested in, the issue of the deceased ancestor, the devise will be void, as being to take effect upon too remote an event, *viz.*, a general or indefinite failure of issue.

limitations, on failure of issue of a *person deceased*.

11. By the express provision of the statute, the rule of construction fixed by it is not to extend to cases, where a contrary intention appears by the will, by reason of the person, the failure of whose issue is in question, having a *prior estate-tail*, or of a *preceding gift being*, without any implication arising from the words referring to the failure, a *limitation of an estate-tail* to such person, or issue, or otherwise.

The exception in the act, of devises on failure of issue of a person having prior estate-tail, and to what cases it extends.

Upon the construction of the first part of this exception, it has been thought, by a late writer, (*w*) that the words, "such person having a prior estate-tail," must be understood, as referring to the case of a testator having a *remainder or reversion*, expectant on an *estate-tail created by a previous will or settlement*, notwithstanding the express requirement, that the "contrary intention shall appear *by the will*;" and this view is supported by the argument, that a different reading of this part of the exception would have the effect of rendering nugatory the second branch of it, *viz.*, that which refers to "a preceding gift being, without any implication, &c., a limitation of an estate-tail." It is conceived, however, that this exception is susceptible of an interpretation, *affixing a definite meaning to each branch of*

it, and, at the same time, *not sacrificing the express provision*, that the contrary intention should appear *by the will*. It should seem, that the words, "prior estate-tail," refer to the limitation of an estate-tail in the usual *direct* mode, (as, to A., and the heirs of his body,) and, those immediately following, to a gift which has the *effect* of raising an estate-tail, under the *Rule in Shelley's case*, by reason of, "heirs of the body, and, issue," and, "children," operating as words of limitation, though occurring in a gift by way of, and intended to take effect as a, remainder after a life-estate in the parent or ancestor. (x) It is true, in both these cases, an estate-tail is created, but the different mode and principles of operation of the respective gifts satisfies the expressions in the enactment alluded to, and renders it perfectly unnecessary, to suppose, that the exception referred to an estate-tail, created otherwise than by the will itself. Doubtless, an *indefinite* construction of words, referring to the failure of issue of a person, who has an estate-tail in the property, is more convenient, and better adapted to the state of the title; but the Legislature has not seen fit, to make any express exception, in favor of such a case, from the general rule of construction fixed by the act in question. Nor is it *necessary*, that the failure should be general, in order that the devise may take effect as a disposition of the *reversion*; although, undoubtedly, that devise will be dependent on the death of the tenant in tail without leaving issue living at that time, and will not, therefore, take effect, on a *subsequent* extinction of his issue.

The other
exception, of

12. There is, also, another exception, from the rule of

(x) It is unnecessary here to enter into the question raised by Mr. Prior, in his Treatise on "Issue," (pp. 191—195,) whether, under a limitation to A. for life, and, after his decease, to his issue, and their heirs, or to them, as tenants in common, *without any gift-over, on failure of issue of A.*, he will take an estate-tail; but the writer

ventures to conceive, that the authorities and principles, cited and adduced in Mr. Jarman's Treatise on Wills, (vol 2, pp. 335—353,) furnish a conclusive answer, in favor of the affirmative of that proposition. See, especially, *Tate v. Clarke*, 1 Beav, 100.

construction prescribed by the act, of cases, where the words, denoting failure of issue, import, if no issue described in a preceding gift shall be born, or, if there shall be no issue, who shall live to attain the age, or otherwise answer the description, required, for obtaining a vested estate, by a preceding gift to such issue. This exception manifestly takes out of the operation of the act, all limitations *embraced by the doctrine of referential construction*, considered in our last Subdivision.

devices referring to failure of issue entitled under a preceding gift, and manner in which it affects doctrine of referential construction.

When, however, it is settled, in regard to any particular limitation on failure of issue, that it is *not exclusively referrible to children or issue taking under a preceding gift*, the statute immediately effects a change in the construction of the limitations. In the first place, it will be *impossible to raise an estate-tail* in remainder, by implication, in the parent, expectant on the interests of the class of issue taking under the previous gift, whether in tail or for life, according to the rule established, (as we have seen) (y) with respect to limitations not governed by the recent enactment. And, in addition to this, if the estates limited to the children or other issue be, *in fee*, the effect will be, to render those estates, defeasible on the death of the parent, without leaving *issue living at that time*.

Where the children or issue take *estates-tail*, they will not, of course, be liable to any such forcible determination, since their very continuance, at and after the death of the parent, decides, that the limitation-over cannot take effect. But it should seem, that the restricted construction will not obtain, when the issue take estates-tail, as, in that case, the limitations fall within the previous exception in the act, which provides for a preceding gift being, a "limitation of an estate-tail to such person, *or issue*." It may be doubted, however, whether this exception meets the case of *children* only, as contra-distinguished from issue, taking estates-tail: no words occur in the preceding part of the section, tending

(y) *Vide supra*, p. 283, *et seq.*

to give, "issue," other than its usual unconfined signification; and it seems difficult to construe the same word in two different senses: if, therefore, it cannot be held to mean, "children," simply, limitations on failure of *issue*, after a gift to *children*, in tail, will be within the rule of construction prescribed by the statute.

Again, if the estates limited to the children be, *for life* only, there will be no premature determination of them, by reason of the restricted construction established by the new law, for those estates must have expired at the death of the parent, or the ulterior gift necessarily fails.

These considerations supply strong ground for *adhering strictly* to those cases, which establish the referential construction; and, it may be added, will induce the Courts to *extend favor* to that construction, as the most effectual mode of giving effect to all the limitations (as operated upon by the recent enactment) (z).

Finally, it is to be observed, in reference to limitations on a dying without issue, after an express gift to children or issue, that the new mode of construction establishes the *validity of the ulterior gift*, in those cases, where it cannot be deemed simply referential to the preceding limitations, and where, also, (as a consequence of the altered construction) no estate-tail can be raised, by implication, in the parent. The failure of issue being, in such cases, restricted to the time of the parent's or ancestor's death, no objection to the gift-over can arise, on the ground of remoteness; though, on the other hand, it will fail, if the first taker leave any issue surviving him.

General observations as to 1 Vict. c. 26, and subjects of foregoing Subdivisions.

Thus, have we considered, the general bearing and operation of the recent enactment, in regard to devises, to take effect after a dying without issue. It will be observed, the rule of construction substituted by the new law, for that

(z) See 2 Jarm. Wills, 415, 416.

which previously obtained, will, in the course of time, remove many of those questions, which occupied our attention in the earlier part of this Chapter, in reference to the construction of words importing a failure of issue, and to the exceptions from the general rule, invalidating limitations, to take effect upon such a failure. (a) The recurrence of these questions, however, will not be *wholly* prevented, even when the (not very proximate) period shall have arrived, that the new law will be operative in regard to *every* will requiring interpretation. The occasional manifestation (sometimes imperfect) by a testator, of an intention, to use words, importing a failure of issue, in the former unconfined sense, and the occurrence of cases, expressly excepted from the operation of the recent act, or not embraced by its provisions, (b) together with the continuance of the old rule of construction, in regard to limitations in deeds, will frequently call for the consideration of questions, similar to, or, even, identical with, those, which have heretofore proved the fruitful source of doubt and uncertainty, in connexion with the general subject of limitations, to take effect after or upon a failure of issue. The view, therefore, here presented, of the principles of law applicable, in regard to limitations in deeds and wills, prior to the recent statute, 1 Vict. c. 26, and of the alterations introduced by that statute, as to wills executed or republished, subsequently to the year 1837, will not, it is supposed, prove either uninteresting or unnecessary.

(a) The third exception (*vide supra*, p. 267,) will not, however, it is obvious, be affected by the new rule of construction.

(b) The words, "or otherwise," contained in the act, in reference to

the exhibition by a testator of a "contrary intention," will present a wide field of discussion, to which authoritative decision alone will enable us to affix bounds.

Limitations on a dying without "heirs of the body."

It will have been observed, that, throughout all the preceding Subdivisions, the expressions, to which our inquiries have had reference, have been, "in default of *issue*," and, "in default of *children*," as distinguished from the expression, "in default of *heirs of the body*," whose general purport, though similar to that of the phrases just mentioned, has (on account of the infrequency of its actual occurrence) been exempt from those questions, as to the influence of particular circumstances and modes of gift, which, as we have seen, form so large a portion of the subjects of judicial discussion and investigation, upon the meaning and operation of limitations, on a failure of *issue* or *children*.

Difference between expressions, "heirs of the body," and, "issue."

The words, "in default of *issue*," are, obviously, more popular, or more easily understood, than, "in default of heirs of the body." The latter words are entirely technical, and their origin is peculiarly legal; while, on the other hand, "failure" or "want of *issue*," is a term, which immediately suggests itself to persons, unaccustomed to the precise phraseology of the law. (c) As a consequence of this, the expression in question is seldom found in the dispositions, which call for judicial construction on account of their informal and untechnical character. If there be *no express* gift to heirs of the body or *issue*, the terms naturally used, to make a gift dependent on the extinction of the whole line of descendants of a person, are, "if he die without *issue*;" while, if there *be* such a previous limitation, but extending only to a particular class of *issue*, the same phrase is, also, of more probable occurrence, whether it be intended to be strictly referential to the prior gift, or not.

In the case of *express* limitations to the descendants of a prior tenant for life, it is undeniable, that the words, "heirs of the body," are of superior force, (as embracing *issue*, indefinitely,) to the word, "*issue*," under similar

(c) See Prior on "Issue," 29, 30.

circumstances, and they will, consequently, retain this indefinite signification, in cases, where, "issue," would be construed as a word descriptive of particular objects, to take by purchase. (d) "Heirs of the body" are, in fact, *proprio vigore*, words, referrible to the whole line of descendants of a person, while, "issue," though, primarily, of similar import, is, yet, in itself ambiguous and less determinate, as not having any proper or necessary legal signification.

But the question, whether, "heirs of the body," in the case of an express gift, operate as words of limitation, or not, is wholly distinct from, or, at least, does not necessarily involve, that with which we are here concerned, *viz.*, whether, in any particular case, the words, "in default of heirs of the body," occurring in a gift-over, either preceded or not preceded by an express gift to heirs of the body or issue, refer to an *indefinite* failure of the heirs special, or to such a failure, *at the death* of the ancestor; or, how far, if preceded by an express gift to heirs of the body or issue, the words in question can be construed as *referential* to the objects of such preceding limitation. In these cases, there is no question, even when the word, "issue," is used, that descendants *of any degree* are contemplated by the contingency; only the period of *ascertaining that failure* being in doubt. No infringement of the technical force of the words, "heirs of the body," ensues from an interpretation, giving to particular circumstances, the effect, of limiting the period at which the failure of issue is to take place. Nor is there any distinction whatever in the relative force of the terms, "heirs of the body," and, "issue," in cases, where it is not possible for *either* to operate as a word or words of purchase; and it may, therefore, be justly conceived, that in regard to any given case of a limitation

Whether these words of different force, when the question does not arise on an express gift to the descendants, but simply on a limitation-over.

(d) See this doctrine forcibly illustrated and observed upon, in the judgment in *Lees v. Mosley*, 1 You.

& Coll. 589. See also 2 Jarm. Wills, 330 n., 347.

on failure of heirs of the body, a construction will hold, similar to that which obtains under the like circumstances, when the word, "issue," is used.

We may, consequently, dismiss the particular mention of limitations on failure of heirs of the body, with a few general observations, in conformity with the sentiments above expressed.

Same rule as to implication of estates-tail, as when "issue" is used.

There is, of course, no question, that, under a limitation to A., and his heirs, or to A., for life, and in the event of his death without heirs of his body, over, the same modification or enlargement (as the case may be) of A.'s estate takes place, as in the case of a similar gift, the word, "issue," being used, instead of, "heirs of the body," viz., the vesting of an *estate-tail* in A., with a remainder expectant thereon, to the ulterior taker: and this, also, upon the same principles, which are; that, in the one case, the author of the gift shows, that by, "heirs," in the first limitation, heirs procreated of a particular body were intended, and, in the other, that by the evident intention, not to give the property over until a failure of all the descendants of the tenant for life, a remainder in tail is raised in the issue, which unites with the prior life-estate, under the *Rule in Shelley's case*. It may also be averred, that all the other rules and distinctions, which have been, at the commencement of this Section, noticed, in regard to the implication or non-implication of estates-tail, where the contingencies contemplated a failure of *issue*, are of equal applicability to gifts affected by limitations-over, on default of *heirs of the body*.

Force of restrictive expressions and circumstances also the same.

As regards the force of expressions and circumstances, accompanying or extrinsic to limitations on a dying without heirs special, to *restrict* that failure to the decease of the ancestor, the authorities do not enable us to speak with any greater degree of certainty or precision, than was found attainable, in respect to limitations on a default of *issue*. Indeed, as has been before hinted, even that which *is* attainable is supported only by the analogy, deducible from the

rules laid down upon the more-frequently-occurring cases of gifts on a dying without issue. (e) This analogy is, however, it is submitted, perfectly free from objection; although, certainly, (and it is a curious circumstance) the point has not engaged the attention of those text-writers, who have enlightened the Profession with their laborious and learned researches on this branch of our law. (f)

Nor does it seem, that the variation of the terms of reference to the line of descendants occasions any difference in the development of the *exception* to the rule, invalidating gifts on a general default of heirs special, founded on the circumstance, of the author of the limitations being a testator possessed of a reversion or remainder expectant on subsisting estates-tail. The nature of the other two exceptions, formerly noticed, clearly does not admit of any question upon this head, as respects *them*.

It is difficult, moreover, to discover any valid ground of distinction, between gifts-over on failure of *heirs of the body*, and on failure of *issue*, in reference to the operation of the *referential* construction, the consideration of which occupied our third Subdivision. The argument, it is obvious, is equally strong in both cases,—that a person, in limiting property to heirs of the body, or issue, or children, or to a class

And, likewise, the *exceptions* of limitations of reversions.

And, also, the application of the *referential* construction.

(e) In reference to one class of restrictive expressions formerly noticed, (*vide supra*, p. 234, *et seq.*,) it may here be observed, that there are several cases, in which the words, “after his decease,” occurring in a gift-over, after an express limitation to heirs of the body, have been denied, any controlling influence upon the previous gift to the heirs special. See *Atkins v. Atkins*, Cro. Eliz. 248; *Doe d. Cole v. Goldsmith*, 7 Taunt. 209; 2 Marsh. 517. And a similar doctrine was held in reference to the

charge of a sum of money, in the case of *Denn d. Geering v. Shenton*, Cowp. 410.

(f) See those excellent specimens of the combination of eloquence of thought and diction, with acuteness and accuracy in the deduction and inculcation of principles, previously entombed in scattered and apparently irreconcilable dicta and decisions,—*Mr. Hayes’ Inquiry*, &c., and his *Principles*, &c. See also *Mr. Jarman’s Treatise on Wills*, vol. 2, c. c. 37—40.

of heirs of the body or issue, with a subsequent gift-over, on a default of heirs of the body or issue, intended the ulterior limitation to take effect, on failure of the objects of the preceding gift: and it seems as clear, that on whatever ground this referential construction is rebutted or denied, when the word, "issue," occurs in the limitation-over, the same objection must exist to the extension of that doctrine to a similar case, where the line of descendants is referred to under the description of, "heirs of the body."

1 Vict. c. 26, does not extend to limitations on failure of "heirs of the body."

Finally, it is to be remarked, that the recent enactment of a new rule of construction in cases, where the gifts depend on a failure of issue, in no way extends to limitations on a "default of heirs of the body," which, as well, therefore, in regard to wills, as to deeds, will continue to be governed by the same rules of construction, as those, either upon authority or by analogy, applicable to them, previous to the establishment of the new principle of interpretation.

General remarks as to the weight due to these positions.

These positions, in reference to gifts on a dying without heirs of the body, (with the exception of the last) are advanced, rather as suggestions, sustainable by reasoning and analogy, than as doctrines, bearing the impress of express adjudication. At the same time, it is clear, the only doubt that can attach to their accuracy arises from the circumstance, of, "heirs of the body," being words, which, *suis viribus*, embrace the entire line of descendants, as contradistinguished from, "issue," which has no such necessary import. It is conceived, however, that satisfactory grounds have been assigned, to prove the inapplicability of this circumstance, to the class of cases here brought under notice, and in reference to which alone, any question of remoteness can arise.

Gift-over in wills on failure of "heirs male," same as when limited on default of "heirs of the body."

It may here be observed, in connexion with this subject, that a gift-over in wills, on failure of "heirs male," has been construed, as similar to a limitation on a dying without heirs of the body, so far as respects the controlling the word,

“heirs,” in a prior gift; (g) and so, doubtless, would any analogous expressions, tending to show, that a class of heirs, less extensive than heirs general, was intended. (h)

SECTION II.

Springing and Shifting Uses and Executory Devises, to take effect on the death of a person without heirs.

Another class of limitations applicable to real estate, similar to those forming the subject of consideration in the last Section, is that of limitations, to take effect after the death of a person without heirs.

As regards the *indefiniteness* of the contingency, it is evident, that it closely resembles a limitation upon a general failure of *issue*; the legal construction of the event of a dying without heirs, being, the death of the person named, and the failure or extinction of his line of heirs, (lineal and collateral) *whenever* it may happen. And that extinction, thus general and unconfined, is necessarily too remote an event, on which to limit an interest in real property, when tested by the Rule for the prevention of Perpetuities. (i) For although it be *possible*, that the person named may die, and a failure of his heirs happen, within the period of time prescribed by the Rule, yet, as we have seen, such *potentia*, albeit *propinquissima*, will not satisfy the terms of the Rule, any more than would, *potentia remotissima*. But the limitation in question would formerly have been void, not only as expressed to take effect on too remote an event; but, also,

Contingency of a person's death without heirs open to same objection of remoteness, as that, of death without issue.

Whether the ancient doctrine against presuming the failure of a person's heirs, of influence at this day.

(g) *Blaxton v. Stone*, 3 Mod. 123.
Denn d. Slater v. Slater, 5 T. R. 335.

(i) *Griffiths v. Grieve*, 1 Jac. & W. 31.

(h) 2 Jarm. Wills, 233.

because the extinction of the general line of heirs of a person was not such an event, as the law would presume, or take notice of. This was an old legal notion, which prevailed prior to the existence of any definite rule, in regard to the remoteness of limitations, as being akin to the ancient but now exploded doctrine, as to a *possibility upon a possibility*. A fee-simple inheritance, in the eye of the law, endures for ever, and any limitation after a fee-simple was void at the Common law, prior to the establishment of Shifting Uses, and Executory devises. But, independently of that technical rule, the contingency in the limitation in question was such as the law would not expect. Whether this notion would now be of any avail against the validity of a limitation, to take effect after a dying without heirs, irrespective of the Rule against Perpetuities, it is difficult to say; although it seems clear, that the force of the doctrine is seriously diminished, if an extinction of heirs, to *happen within the period of perpetuity*, be so far presumable, as to admit of a future estate being limited to arise upon it. The writer is not aware of any case, in which the validity of a limitation, to take effect on a restricted failure of heirs, has been affirmed, or the point itself at all discussed. As a question of *remoteness*, it is clear, that if the failure be confined to a period within the limits of perpetuity, the event is, *so far*, unobjectionable. The sole remaining question, then, would be, whether the old legal doctrine, of the unpresumableness of a general extinction of heirs, is, at the present day, entitled to any weight. On the one hand, it may be urged, by analogy to the rule which obtains, in the case of a limitation after a restricted failure of *issue*, that if all objection on the score of remoteness be removed, it is valid; while, on the other, it may be said, that the ancient doctrine, which declares the event of an extinction of the line of heirs, not to be such as the law can expect, or take notice of, loses none of its force, from the mere circumstance, of that extinction being confined to happen within a prescribed period

of time. To strike the balance between these considerations, seems a task of as much difficulty, as the decision of the numerical difference between *six* and *half-a-dozen*.

But although a limitation, whether by way of devise or use, after a dying without heirs, is, in general, void; there are, yet, some exceptions to this rule, which shall now be shortly noticed.

In the first place, then, let us suppose the case of an estate being limited by *will*, to A. and his heirs, and if, or when, he dies without heirs, or without an heir, then to B., and his heirs. As the limitations stand, it is clear, as above observed, that the future estate limited to B. is void, *ab initio*. But let it be supposed, that B., the person to whom the limitation-over is made, is a relative of, and capable of being collateral (it would be absurd to assume him a *lineal*) heir to, A., the first devisee. Here, it is manifest, that either nonsense must be imputed to the testator, or a construction must be put upon the word, *heirs*, short of or different from its proper legal signification. If the words are to be taken in their ordinary sense, then, the testator must be understood to have devised the property to a person, and a certain line of representatives or descendants of such person, and to have, further, intended it to go over on the death of that person, and the extinction of his line of descendants, to an individual included in the line, and through whom the property either has, or must be presumed to have, passed, before the event happens, on which the ulterior limitation in favor of that individual can possibly take effect. That such, therefore, cannot be the *intention* of the deviser, is certain, unless he be assumed to have designed to make a testamentary disposition, not useless and incapable of taking effect only, but void of all sense. To render the limitations consistent, consequently, the word, "heirs," is read as, "heirs of the body," and, thus, the prior fee is abridged into an estate-tail, and the ulterior

Limitation on death of person without heirs, good, when ulterior taker in line of heirship to the former, his fee being cut down to an estate-tail.

limitation takes place as a remainder expectant upon it. (*k*) Thus, where (*l*) A. devised lands, to B., and his heirs, and for want of heirs of him, to D., who was a near relative of B., it was adjudged, an *estate-tail* only in B., because he could not die without heirs, so long as D., or any of his lineal heirs, existed. So, where (*m*) A. devised lands, to his wife, for life, remainder, to his son, H., for life, remainder, to his son, G., and his heirs for ever, and if he should die without heirs, then, to the testator's two daughters: it was adjudged, that G. took an estate-tail; for that it was impossible, he should die without heirs, whilst his sisters were living; consequently, the testator by, heirs, could only mean, heirs of the body. And again, in a more recent case, (*n*) a testator devised real estate, to his wife, for life, remainder, to his son, J. P., and his heirs for ever, and if it should happen, that the said J. P. died without heirs, the testator gave the property, to his daughter, S. P., and her heirs: J. P. died, leaving a daughter, who died unmarried. It was held, that the heir of the daughter, S. P., was entitled to recover under the devise to her: the Court said, it was clear, that the testator never meant, that his daughter should take, unless, those whom he calls, the heirs of his son, should fail; and that, as the next limitation was to his daughter, after the failure of heirs of his son, it was clear, that he meant a class of heirs, amongst whom the daughter could not be enumerated, for, if otherwise, he would be giving a remainder-over, which could not take effect, till after the extinction of the person, to whom it was given.

Same rule, if ulterior gift be to heirs of testator, if such heirs be necessarily in line of heirship to first-taker.

But, still further, if there be a devise of land, upon failure of heirs of a prior devisee, to the heirs of the testator himself,

(*k*) F. C. R. 466; 2 Prest. Abst. 161; 2 Prest. Estates, ch. "Tail;" Burt. Elem. Comp. 223.

(*l*) *Parker v. Thacker*, 3 Lev. 70.

(*m*) *Tyte v. Willis*, Ca. temp.

Talb. 1.

(*n*) *Doe d. Hatch v. Bluck*, 6 Taunt. 484. And see also *Jones v. Legg*, or *Ives v. Legg*, 9 Mod. 461; 3 T. R. 488.

and such heirs must also be *heirs to the first devisee*, the word, "heirs," in the first devise, will be construed to mean, "*heirs of the body*," in the same manner, as if the ulterior devise had been, to a collateral heir of the first devisee. (o) As, where (p) A., having three sons, A., B., and C., devised property, to his second son, B., and his heirs for ever, and *for want of such heirs*, then, to the *testator's right heirs*; it was held, that although the devise to the testator's right heirs was void, inasmuch as (by the then law) such heirs must be in (if at all) by descent, yet the devise was sufficient to manifest the testator's intent, to use the word, "heirs," in the sense of, "*issue*," and to aid the construction of an estate-tail. In the argument, the case of the plaintiff (claiming as heir to the testator) was rested upon the knowledge, the testator must be presumed to have had, that his second son, B., could not, by any possibility, die without heirs, so long as his father had any other issue, who would be heir to him. But this reasoning falls short of the rule established by the case. The testator was not obliged to assume, that he would have any other issue living at the decease of B., whose existence would show, in what sense he used the word, "heirs," in the devise to B.: such issue *might*, or *might not*, then exist. Moreover, the testator might have issue by a different marriage, in which case, by the rules of inheritance which then obtained, the existence of *issue of the father* would not be a convertible proposition for the existence of *heirs of the son*. But it is quite clear, the reason of the decision had no necessary connexion with the contingency, of the testator having *lineal* heirs alive at the death of B., under the circumstances expressed in the will. All the collateral heirs of the testator, (brothers and uncles, for instance,) who would be included in the line of heirs of the son, and during whose existence, therefore, the son could not die without an heir,

(o) F. C. R. 467.

(p) *Nottingham v. Jennings*, 1 P. Wms. 23.

it is plain, would have been equally entitled to recover, had there been no lineal descendant living, upon the death of B., the son, without issue. It must be noted, in reference to these cases, that as semi-kindred are now entitled to inherit, it would seem, that the two lines of heirs of the father and son are co-extensive, and that no person can be inheritable, as included in the one, who is not, at the same time, necessarily comprised in the other.

Difference in respect to limitations to half-brothers, and lineal ancestors, on a dying without heirs, before and since statute 3 & 4 Gul. 4, c. 106.

It follows, from the preceding observations, that, prior to the new Law of Inheritance, (3 & 4 Gul. 4, c. 106, s. 9,) a limitation to the half-brother of a prior taker, on failure of heirs of the latter, would not have operated, to cut down the fee-simple first devised, to an estate-tail, (q) because the law regarded a half-brother as no more than a mere stranger, in respect to descents. And, in all cases, where the testator died previous to the year, 1834 (r), (the period of the commencement of the operation of the new statute) the old rule must still be abided by. With respect, however, to all devises, by testators dying subsequently to the year, 1833, the effect of a devise to the half-brother of a previous devisee, on the death of the latter without heirs, will be the same, with that, of a similar devise to any other person inhe-

(q) *Tilbury v. Barbut*, 3 Atk. 617. *Preston d. Eagle v. Funnell*, Willes, 164. And see 1 Ves. sr. 89; 2 Jarm. Wills, 238.

(r) It is difficult, indeed, to say, when the operation of the new Law of Inheritance commenced, in regard to a case, like that noticed in the text. By the 11th section of 3 & 4 Gul. 4, c. 106, it is provided, that the act shall not extend "to any descent, which shall take place on the death of any person, who shall die before the 1st day of January, 1834." Now, in the case supposed, as no descent at all takes place, it seems difficult to apply to it the clause in question, and, especially, as it is a *restrictive* clause,

i.e., one that introduces a provision in contravention of the natural operation of the act, which is *immediate*. Perhaps, therefore, if there ever be occasion to consider the question (which is not probable, as there was only four months' interval between the passing of the act, and the 1st day of January, 1834,) it may be ruled, that, in regard to a case, in which no actual descent takes place, the act will apply, if the deceased person died after its passing, although prior to the period fixed for the commencement of its operation, in cases where there *is* an actual descent. But see 2 Jarm. Wills, 238, 239.

ritable to the first devisee, *vis.*, the restriction of the word, "heirs," in the first instance, to mean, "heirs of the body." And so, again, with reference to *ancestors*; who, by the new law, are admitted to the inheritance, in preference to collateral heirs claiming through them: a gift by a son, to his brother and his heirs, with a limitation-over, in default of such heirs, to the father of the donor, will give the brother an estate-tail, with remainder, to the father.

Further, there are cases, in which, as the first taker can have no heirs but those of his own body, the limitation-over, in default of his heirs, is, by inevitable construction, confined to mean, "heirs of the body," although the ulterior donee be (as, *ex hypothesi*, he necessarily must be) entirely unconnected with the first taker. Thus, if there be a limitation to a person, who is a *denizen*, or a *bastard*, and his heirs, and in default of heirs, over; as, to render the limitations consistent with the real facts of the case, the word, "heirs," must be read in the sense of, "*heirs of the body*," an estate-tail will be raised in the first taker, with remainder-over. (*s*)

In all other cases, however, but those, in which, according to the rules above laid down, the estate in fee first given can be modified into an estate-tail, a devise, after a general failure of heirs of a person, is void, as too remote. (*t*) And this, of course, whether any preceding estate be given to the person, on failure of whose heirs the devise is to take effect, or not.

Before dismissing this subject, it may be allowed, to suggest a case, which has not, as far as the writer knows, been the subject of judicial decision, and which seems to be attended with some difficulty. Suppose a devise, in the event of the death of the testator's *heir* (to whom *no express*

Limitations to bastards and denizens and their heirs, and gifts-over on failure of their heirs.

Whether doctrine of implied estates-tail will be applied, when person whose heirs are to fail is testator's heir, not taking by express gift.

(*s*) 2 Prest. Abst. 161; 2 Prest. Estates, 519. *Sed vide, è contrà*, per Holt, C. J., in *Idle v. Cook*, 1 P. Wms. 78; but he seems to have been speak-

ing of limitations in *deeds*; as to which, *vide infra*.

(*t*) 2 Jarm. Wills, 238.

gift is made) without heirs, to a person included in the line of heirs of the testator's heir; would the ulterior devise be void? or would the testator's heir take an estate-tail, by implication, and the devise be thereby validated, as a remainder expectant upon it? Would, in fact, the Court, in construing the devise, inquire into the character and position, as well, of the person, on failure of whose heirs the devise is to operate, as, of the devisee; of the former, to ascertain, that he is the testator's heir, and, of the latter, to see, if he be within the line of consanguinity of the heir.

Word, "leaving," of same import, as in gifts on failure of issue.

Here, it must be remarked, that the word, "leaving," in a gift-over, on failure of *heirs*, receives the same interpretation, as when in connexion with the contingency of a dying without *issue*; that is, it refers to the event of the failure at any period of time, however distant.

How far, the rule of implication of estate-tail from consanguinity of ulterior taker, of force in regard to limitations in deeds.

It only remains, to observe, that the preceding observations, as to the implication of estates-tail, can only be fully understood, of limitations in *wills*; for it does not seem to have been ever decided, that the circumstance of the person, to whom a limitation on failure of heirs is made, being within the line of heirship to the prior donee, will justify the curtailment of the fee first given, into an estate-tail. Mr. *Preston* thus remarks upon this point (*u*):—"A limitation to a man and his heirs *generally* will not be qualified to mean, heirs of the body, by a clause which introduces a remainder, to take effect in default of *heirs generally*," "unless, *perhaps*, the person, who is to take in remainder, be of the whole blood of the person, who is to take under the preceding limitation, and in the line of heirship to him, and except in the particular case of a donee, being a *bastard*, or a *denizen*." And, again, the same learned writer observes (*v*):—"It is not clear, that a *feoffment* to a man and his heirs, and if he shall die without heirs, to a kinsman of the whole blood, who may succeed to him as his heir, will qualify the

(*u*) 2 Essay on Estates, 519.

(*v*) *Ib.* 536, 537.

words of limitation to the heirs to mean, heirs of the body. In a will, such an expression will certainly have this effect."

The extreme scarcity of authorities applicable to limitations in instruments *inter vivos*, upon a failure of *issue*, precludes us from drawing any satisfactory analogy, from that class of cases, in reference to the question under consideration. That question obviously depends upon these two points:—*first*, whether a Court of law would consider itself justified, in looking at the circumstances extrinsic to the deed, for the purpose of ascertaining, whether the ulterior donee were inheritable to the person, the failure of whose heirs is contemplated; and, *secondly*, whether, if it be ascertained, that such is the fact, that fact would be sufficient to rebut the force of the express limitation, to the *heirs general* of the prior donee. (*w*)

SECTION III.

Executory limitations of terms of years and personal chattels, to take effect on the death of a person without issue.

We have seen, that terms for years and chattels personal are susceptible of limitations by way of Executory bequest, in wills, and, of similar modifications of trusts, in deeds; that such limitations are unbarrable or indestructible by the owner of the preceding interest for the time being; and that, as a consequence, they are within the operation of, and must be limited to take effect within the period fixed by, the Rule against Perpetuities. To apply this Rule to

Preliminary remarks.

(*w*) It must be admitted, that the general complexion of the judges' observations, in *Idle v. Cook*, 1 P. Wms. 70, is unfavorable to the extension of the doctrine of implied estates-tail noticed in the text, to limitations in deeds.

Executory bequests and limitations of trusts of chattels, after or upon the failure of issue of a person, is the object of the present Section.

All limitations of personalty depending on an indefinite failure of issue, bad, as too remote.

In the first place, it will follow, from the observations before made, in reference to the indefiniteness of the event of a general failure of issue, as applicable to limitations of real estate, that a disposition of a term or other personal estate, to take effect after the death of a person without issue, the happening of that event not being restricted within the allowed period, is too remote. And this, whether the person, on failure of whose issue the limitation is to operate, take under a prior gift, or not, and (in the former case) whether such gift comprise the whole term, or a life-interest only. In all such cases, the limitation is necessarily void, as depending on an event, unrestricted in point of time, and, therefore, too remote; and, as we shall presently see, it is not capable of being supported by any enlargement, or other alteration, of the first taker's interest, by virtue of the implication arising from the ulterior gift.

And no estate can be raised by implication in first taker, capable of supporting ulterior gift.

And here the question arises, whether, in cases similar to those, in which, as regards *realty*, an estate-tail is raised by implication in the first taker, any analogous alteration is effected in the interest of the first taker, in a *term*, by virtue of a subsequent limitation on failure of his issue, which, as we have seen, is void.

To arrive at a proper understanding of this question, it is necessary, to consider the effect, in regard to a term, of a limitation, which, applied to real property, would create an estate-tail. Now, it is evident, that two things are essential to an entail, within the Statute *De donis*: one, that the *subject* be land, or some other thing of a *real* nature; the other, that the *estate* in it be an *inheritance*. Therefore, (as Mr. Hargrave says) (*x*) neither estates *pur autre vie* in lands, though limited to the grantee and his heirs, during

(*x*) Harg. n. to Co. Litt. 20 a, n. 5.

the life of *cestui que vie*, nor terms for years, are entailable, any more than *personal chattels*; because, as the latter, not being either interests in things real, or of inheritance, want *both* requisites; so, the two former, though interests in things real, yet, not being also of a descendible quality, are deficient in *one* requisite. Let us suppose, then, a limitation of a term of years, to A., and the heirs of his body, and in default of such issue, over. It is clear, A. cannot take an estate-tail, descendible to his issue, in the same manner, as in the case of an entail of realty; and it is equally clear, that the ulterior limitation is not to take effect, until a general failure of A.'s issue, and is, consequently, void. There being, therefore, no mode of descent or transmission, by which the issue of A. can succeed to the term, *per formam doni*; but yet, the words of the gift being such, as would create an estate of inheritance in realty; the Courts hold, that the whole interest in the term vests absolutely in A., by force of the limitation in question, as the interest corresponding most to an entail of real estate, and most nearly answering the intentions of the author of the gift. (y)

Now, (to return to the question under consideration) let it be supposed, that a term is bequeathed to A., indefinitely, and if he shall die without issue, to B. In the case of real estate, we have seen, that such a limitation would raise an estate-tail in A., with remainder, to B.; the gift to B., on failure of A.'s issue, showing, that they were intended to take under the first limitation; and the proper mode of effectuating that intention being, the raising an estate-tail in the ancestor, A., by the conjoint operation of an implied gift to the issue, and the Rule in *Shelley's* case. But though a like intention is manifested, in the case of such a limitation of a term, the nature of the subject of the gift does not admit of any other interest being raised, by impli-

(y) Burt. Elem. Comp. 324. 2 late case of *Kerr v. Lord Dungannon*,
Rep. Leg. 393; and authorities there 1 Con. & Law. 335.
cited. F. C. R. 426, *et seq.* See the

cation, in A., than he could take, under an express limitation to him and the heirs of his body, which, as we have seen, passes the absolute term; and, accordingly, in the case supposed, A. takes the whole interest in the term, and the executory limitation to B. is void. (2) Not, that there is any necessary connexion between the absolute interest vesting in the first taker, and the invalidity of the ulterior bequest; for that bequest is void, by reason of the remoteness of the event, irrespectively of the nature or extent of the interest passing to the prior legatee. We discover, therefore, a great difference between the two constructions, as applicable to real and personal estate, respectively: that, whereas, in regard to the former, the raising an estate-tail, by implication, in the first taker, validates the ulterior limitation, as a remainder expectant upon it; as respects the latter, the vesting the absolute interest in the term in the prior legatee, (although the construction only obtains, by analogy to the implication of estates-tail in realty, and in those cases alone, in which such implication would be made) does not at all assist the ulterior bequest, inasmuch as it cannot take place as a remainder, and, therefore, violates the Rule for prevention of Perpetuities.

And no difference between cases, where an estate-tail would be raised by implication only, and where, by express gift.

A distinction was indeed, formerly attempted to be taken, between a limitation of a term, by such words, as, in the case of realty, would vest an express estate-tail in the first taker, and a limitation of the same, by such words, as, in the case of real property, would give an estate-tail, only by implication, to the effect, that, in the latter case, the failure of issue must be understood as restricted to the death of the first legatee, and that, consequently, his interest in the term must be confined to his life. But this notion has long been exploded; and Mr. *Fearne*, after noticing the authorities applicable to the subject, thus luminously states the general rule of law (a):—That although

(2) Burt. Elem. Comp. 326. 2 cited.
 Rop. Leg. 394; and authorities there (a) F. C. R. 485.

in the limitation of a personal estate, after a dying without issue, those words shall not, *ex vi termini*, and without the concurrence of any other circumstance of intention, signify a dying without issue then living, even though the limitation is in the nature of an estate-tail by implication only; yet, on the other hand, they shall not, *ex vi termini*, when there is any other circumstance of intention, import an indefinite failure of issue, even though the limitation is in the nature of an express estate-tail; but that, in either case, *if the limitation rests solely upon the usual extent and import of those words*, the limitation-over is too remote, and, therefore, void, and the whole vests in the first devisee or legatee; but that, in either case, the signification of these words may be confined to a dying without issue then living, by any clause or circumstance in the will, which can indicate or imply such intention. (b)

And so, again, if a term or other personal estate be bequeathed to A., for life, and if he die without issue, to B.; the effect of the limitation-over upon the failure of A.'s issue is, to vest the absolute interest in the term in him, notwithstanding the previous express bequest for life. And this, by analogy to the rule, which obtains in regard to similar limitations of realty, whereby (as has been seen) an estate-tail is raised by implication in A., by reason of the manifestation of an intention in the author of the gift, that the ulterior limitation is not to take effect, until the extinction of the issue of the first taker. Some doubt appears to have formerly existed, (c) as to the question, whether the *express gift for life* did not amount to a declaration of *intention*, that the interest of the first taker should be *confined* to his life (in which case, the interest, intermediate his death and the time of the ulterior limitation taking effect, being un-

Where first gift, for life only, it is enlarged to a limitation of the absolute interest, and ulterior gift, void.

(b) And see remarks of Lord Brougham, C., in 2 Russ. & My. 409.

(c) *Love v. Windham*, 1 Mod. 50; 1 Lev. 290. *Clare v. Clare*, Ca. T.

Talb. 21. *In arguend. Wilkinson v. South*, 7 T. R. 556. F. C. R. 487. Rand. Perp. 148.

disposed of, and the last-mentioned period being too remote, there would be a failure of disposition); but later determinations (*d*) have negatived this supposed distinction, between the bequest of a term, expressly for life, and an indefinite bequest, and have established, that, in regard to both, the effect of the limitation-over on the failure of issue of the first taker, is, to vest the absolute interest of the term in him. Indeed, the circumstance, that the express life-interest will be enlarged by a subsequent bequest-over on an indefinite failure of issue of the legatee for life, was, in one case, made use of as an argument, in support of the construction of a *restricted* failure. (*e*)

First gift remains in *statu quo*, when it passes the absolute interest.

Where the prior bequest of the term is absolute, (*i. e.* passes the whole interest,) it need hardly be remarked, that a subsequent limitation, upon failure of issue of the first taker, effects no alteration in his interest; that limitation being void for remoteness; and the prior bequest having already vested an interest, corresponding to the estate-tail, to which the fee would have been cut down, had the subject-matter of the gift been real estate.

Wherever personality limited by words, which would create estate-tail in realty, the absolute interest passes.

It may be observed, in passing, that, not only in the cases above specified, but, also, in every case of a bequest of a term, by such words, as, applied to realty, would create an estate-tail, either express or implied, the absolute interest of

(*d*) *Boden v. Watson*, Ambl. 398. Judgment in *Target v. Gaunt*, 1 P. Wms. 432; in *Attorney-General v. Bayley*, 2 Bro. C. C. 553; and in *Knight v. Ellis*, ib. 570. *Barlow v. Salter*, 17 Ves. 484. *Andree v. Ward*, 1 Russ. 260. *Greene v. Ward*, ib. 262. *Lepine v. Ferard*, 2 Russ. & My. 378. *Malcolm v. Taylor*, ib. 416, 444, 445. *Simmons v. Simmons*, 8 Sim. 22. In the case of *Ferard v. Griffin*, 2 Keen, 615, it was held, that an express life-interest was not enlarged by a subsequent bequest upon the general failure of issue of the legatee, because the context of

the will afforded clear evidence, that it was not intended, he should take the capital of the fund.

(*e*) See the case of *Ranelagh v. Ranelagh*, 2 My. & K. 441, (stated *infra*, p. 342,) in which it was treated as clear, both by Sir J. Leach, M. R., and Lord Brougham, C., that the consequence of holding the failure of issue referred to, to be indefinite, (which was the question under discussion,) would be, the enlargement of the express life-interest, into an absolute bequest of the *corpus* of the fund. And *vide infra*, as to the argument noticed in the text.

the term will vest in the person, who would be tenant in tail under a limitation of realty, (*f*) except in certain cases, where the existence of an express gift to the issue has enabled them to take as purchasers, and where, therefore, the interest of the first taker has been confined to his life. (*g*) And a further exception arises, in regard to those cases, in which an estate-tail is implied, in consequence of some characteristic of the devisee, or other person connected with the limitations, peculiar to real estate; *e. g.*, the case of a limitation upon failure of issue of the testator's heir, to whom no preceding gift is made, or to the heir, in default of issue of a stranger, to whom no previous estate is given; in both which cases, as we have seen, (*h*) an estate-tail is raised by implication in the ancestor, on failure of whose issue the devise is to take effect.

Exceptions to this rule.

In regard to the enlargement of prior limited interests in chattels, by force of subsequent gifts-over, on a general failure of issue of the first taker, when the limitations are by instrument *inter vivos*, it is to be observed, that the same rules and distinctions hold, as have been formerly (*i*) noticed to exist, in respect to similar gifts of realty; the general rule before mentioned, as to the effect, in regard to personalty, of a construction, which raises an estate-tail in realty, being applicable to deeds, as well as to testamentary instruments. But it will be remembered, that the difference between the two classes of dispositions, as respects the relative facility of the implication of estates-tail, is of no moment, as to the question of *remoteness* of gifts of *personalty*, since, whatever the operation of the ulterior limitation upon the precedent interest, that limitation, if the indefinite construction obtain, must necessarily be, and always is, too remote.

As to the enlargement of partial interests in personalty, under limitations in deeds.

But, notwithstanding the invalidity of limitations of chattels, to take effect upon a *general* failure of issue, such limi-

Limitations of personal estate on a *restricted* failure of issue.

(*f*) F. C. R. 492.

(*g*) 2 Rep. Leg. 393.

(*h*) *Vide supra*, p. 181, *et seq.*

(*i*) *Vide supra*, p. 179, *et seq.*

tations are allowable, when the event of a dying without issue is restrained to *the death of the first taker*, or of any other person, *in esse* at the time of the gift, or when the limitation is made to depend upon the death of such issue *under the age of twenty-one*. (*j*) And in all such cases, where the dying without issue is clearly restricted to the period fixed by the Rule against Perpetuities, it matters not, whether there be a prior bequest to the person, the failure of whose issue is referred to, or not, or (if there be such a prior bequest,) whether the first legatee take the whole term, or only a life or other less interest in it. (*k*) But it must be observed, that if the failure of issue be thus restricted, the interest of a legatee for life, expressly, will not be enlarged, by reason of the gift-over on his death without issue, because, in the case of such a limitation of realty, no estate-tail would be raised by implication in the first taker. (*l*)

In such cases, no enlargement of first taker's interest, if, for his life only.

Question to be decided is, whether particular limitations depend on an indefinite or a restricted failure.

As, in reference to limitations of real estate, upon the death of a person without issue, we discovered, that the question most frequently difficult of decision was, where an indefinite, and where a restricted, failure of issue was intended by the author of the gift, so, in regard to terms and other chattels, we shall find, that the same question has been equally prolific of discussion, and the parent of as many (if not more) rules and distinctions. It will, therefore, be our office, now to inquire, what words are construed to mean a general or indefinite failure of issue, and what, a restricted or confined failure; and, also, what additional and accompanying expressions and circumstances are allowed to have the effect, of controlling words, primarily importing a general failure of issue, and restraining them, to a dying without issue living at the death of the ancestor.

And, at this point, it will be proper, to adopt a mode of distribution of our subject, similar to that, which was found

(*j*) 2 Rep. Leg. 396; and authorities there cited.

(*k*) F. C. R. 477.

(*l*) *Vide supra*, p. 187, *et seq.*

convenient, in the prosecution of our inquiries relative to limitations of real estate.

SUBDIVISION I.

Of the expressions and circumstances giving a restricted construction to words primarily importing an indefinite failure of issue.

In the outset of this inquiry, it must be observed, that, in the case of personal estate, the Courts generally incline to discover and lay hold of any circumstances or expressions, connected with the limitations, that may seem to afford a ground for construing words, referring to a dying without issue, to mean, a failure of issue at the time of the death of the parent or ancestor, (m) which, it will be remembered, is the reverse of the general rule of construction, that obtains in regard to limitations of real estate, not within the operation of the statute, 1 Vict. c. 26. (n) Nay, it may even be said, that the tribunals, both of law and equity, are *astuti*, to frame or invent grounds and reasons, on which to rest a restrictive interpretation of words, contemplating a failure of issue.

Inclination of law in favor of restricted construction, in regard to limitations of chattels.

The reason, generally assigned for this inclination, is, that by the construction to which it leads, the limitation-over may be supported; an argument not deemed applicable, in the case of real estate, because of the supposed conflicting interests of the heir-at-law.

Ground of this.

(m) F. C. R. 476. Judgment in *Doe d. Cadogan v. Ewart*, 7 Ad. & Ell. 648; and in *Campbell v. Hard-*

ing, 2 Russ. & My. 403.

(n) *Vide supra*, p. 191.

Word "leaving" authorises this construction.

In the first place, wherever a term or other chattel is bequeathed to a person, and if he die without *leaving* issue, to another, the failure of issue intended is held to be, a failure of *issue living at the death of the first taker*; (o) thus giving *literal* effect to the word, "leaving," which, of course, in its common acceptation, and dissociated from legal interpretation, is understood to refer to the particular time of the death of the parent or ancestor, and not, to any subsequent indefinite period.

Case of *Forth v. Chapman*, establishing this rule.

To establish this, it will be unnecessary, to do more, than refer to the case of *Forth v. Chapman*, (p) (before cited,) which first laid down the distinction, in regard to the construction of the word, "leaving," between limitations of real and of personal estate. In that case, it will be remembered, a residuary real and personal estate was devised to *William* and *Walter Gore*, and if either of them should depart this life, and *leave* no issue of their respective bodies, then, over. Sir *Joseph Jekyll*, M. R., was of opinion, that the devise-over was void, and said, that "if the words had been, 'if A. or B. should die without issue,' the remainder, over, this, plainly, would have been void, and exactly like the case of *Love v. Windham*." And he then proceeded to say, there was no diversity betwixt a devise of a term to one for life, and if he die without issue, remainder, over, and a devise thereof to one for life, with such remainder, if he die *leaving* no issue; for that both these devises seemed equally relative to the failure of issue, at any time after the testator's death. Afterwards, this case coming before Lord Chancellor *Parker*, on appeal, his lordship reversed the decree, and observed, that if a term was devised to A., and if he die without leaving issue, remainder, over, in the vulgar and natural sense, it must mean, if A. die without leaving issue at his death, and, then, the devise-over was good; that the word,

(o) 2 Jarm. Pow. Dev. 566.

(p) 1 P. Wms. 663.

die, being the last antecedent, the words, "*without leaving issue*," must refer to that; and that, if the words in a will would bear two constructions, one whereof was more common and natural than the other, it was hard to say, the Court should take the will in the most uncommon meaning, to destroy it. Ever since this decision, the rule laid down in it has been adhered to, with more or less of scrupulosity. And, in a very recent case, (q) where there was a devise of real estate, in trust for J., and her heirs, but in case it should happen, that J. died without leaving lawful issue, over; it was observed by the Court of B. R., that, without any doubt, the words of the will would, if *the question arose upon a term for years or other personal estate*, be held to mean, a dying without issue *living at the death* of the daughter, J.

It will be observed, that the construction thus put upon the word, "leaving," is arbitrary and absolute, and perfectly independent of any assisting circumstances or expressions contained in the instrument; although, of course, it is liable to be set aside by the manifestation of an intention, to use the words, "die without leaving issue," in their more extended signification, of a failure of issue, *at any period*, however remote. For example, in one case, (r) the circumstance, of a general power of appointment or disposition being vested in the ancestor, was held, to afford sufficient evidence, of the object of the testator being, the personal benefit of the first taker, so as to control any inference arising from the word, "leaving," and thereby to invalidate the ulterior gift as limited upon an indefinite failure of issue. So, again, the circumstance, of real and personal estates being included in one general gift, under which, by the rules of law, an estate-tail is raised by implication, in the realty, has been sometimes held sufficient, to warrant the application of the same rule of construction, as respects

Inference from word "leaving" may be rebutted by expressions and circumstances.

As, first taker having a general power of appointment;

—realty and personalty being included in one gift;

(q) *Doe d. Cadogan v. Ewart*, 8 Ad. & Ell. 636. And see *Clapton v. Bulmer*, 10 Sim. 126. (r) *Attorney-General v. Hall, Fitzgib.* 314.

—words contemplating failure of issue of issue.

both estates. (*s*) And, yet further, where, (*t*) in addition to the words, “die without leaving issue,” there were words, referring to *the failure of issue of such issue*, the same rule of construction, which was held to raise an estate-tail in the ancestor, in the realty, was applied, to vest in him, the absolute interest in the personalty; upon the ground, (as must be supposed) that the superaddition of words, referring to the death without issue of the immediate or first-mentioned issue, negatived any presumption, arising from the word, “leaving,” that the failure of issue contemplated, was to be ascertained at the death of the ancestor.

But restrictive force of “leaving” not negatived by circumstance of prior gift being such as would create express entail in realty.

On the other hand, the restrictive force of the word, “leaving,” with reference to limitations of personal estate, after a dying without issue, has had place, even in cases, where the prior limitation has been such, as would have created an *express* estate-tail, had the subject-matter of the gift been realty; the construction, in that case, being, that the first taker has a defeasible interest, liable to go over, if he die without issue living at the time of his death. Thus, where (*u*) a testator bequeathed leasehold property, to A., and to his lawful heirs, and if he die and *leave no lawful heir*, then, to B.; it was held, that the limitation to B. was good; the words, “leaving no lawful heir,” being, in the first place, interpreted to mean, “leaving no lawful issue,” and, then, being confined to, “leaving no issue at the time of his death.” So, also, where (*v*) there was a devise of freehold and leasehold estates, to A. and B., as tenants in common, and the heirs of the body and bodies of the said A. and B., as tenants in common, and if either of them should die *without leaving issue*, then, as to the share of such of them as should so die without issue as aforesaid,

(*s*) *Mortimer v. West*, 2 Sim. 274.
Franks v. Price, 3 Beav. 182. And
see *Richards v. Bergavenny*, 2 Vern.
324.

(*t*) *Franks v. Price*, *ubi supra*.

(*u*) *Goodtitle d. Peake v. Pegden*,
6 T. R. 720.

(*v*) *Radford v. Radford*, 1 Keen,
486. See *vide*, *Daintry v. Daintry*,
6 T. R. 307.

to the use of the survivor of them, the said A. and B., and the heirs of his body, and in case both of them should die without issue of his or their body or bodies, then, over: it was held, that, with respect to the leasehold estate, the limitation to the survivor of the devisees, in case either of them should die without leaving issue, was, upon the authority of *Forth v. Chapman*, a good limitation by way of Executory devise. This may be regarded as carrying out the legal signification of the word, "leaving," in limitations of personalty, to its fullest extent, inasmuch as there can be no question, that, in the case of a direct bequest to a person and the heirs of his body, *all* the issue, however remote, of the legatee are intended to be and are actually comprised, and, "leaving," might well enough, therefore, in such a case, be referred to the period of the failure of such issue, whenever it occurs.

It is to be noted, that, in equity, the word, "leaving," has the same confined signification, when the subject-matter of the gift is *real estate directed to be sold or converted into money*; the property being, in that case, considered as if actually changed. (*w*)

It is to be observed, that the words, "dying without children," receive the construction of an indefinite failure of issue, as well; in the case of limitations of personalty, as, where the subject-matter is real estate. (*x*) But it is almost unnecessary to remark, that if the contingency expressed be, death without *leaving* children, it contemplates a failure of issue (or, perhaps, *children*, (*y*)) *at the death* of the parent. (*z*)

Expression,
"dying without
children."

The signification of the words, "dying without issue," or, "without having issue," which obtains in regard to

Meaning of
"dying without
issue," and

(*w*) See *Farthing v. Allen*, 2 Madd. 310.

(*x*) *Hughes v. Sayer*, 1 P. Wms. 534. The case of *Studholme v. Hodgson*, 3 P. Wms. 299, is, obviously, to be accounted for, from the particular

expressions that occurred in the gifts.

(*y*) *Hughes v. Sayer*, *ubi supra*.

(*z*) See an instance of this kind of gift, in *Clarke v. Lubbock*, 1 You. & Coll. N. C. C. 492.

"without having issue," same as in case of real estate.

limitations of real estate, is equally applicable to similar gifts of personalty; *viz.*, that, unless controlled by additional expressions or concomitant circumstances, they primarily import a general failure of issue. What those expressions and circumstances are, is the inquiry next in order.

Expressions and circumstances of restrictive force, as regards realty, equally operative in respect to personalty.

We may take it as a general rule, that whatever expressions or circumstances are held to have the effect, of confining words, primarily signifying an indefinite failure of issue, to a dying without issue living at the death, in regard to limitations of real estate, will be allowed to operate in the same manner, as respects limitations of terms and other chattels.

1 & 2. Charge of a sum of money, and limitation of life-interest only.

1 and 2. It follows, therefore, that the charge of a sum of money upon the legatee of a term, upon the failure of issue of a prior legatee, (a) and the circumstance, of the ulterior bequest or bequests being of a life interest or interests only, (b) will be sufficient, to indicate an intention, to use the words, referring to the failure of issue, in the sense, of a dying without issue living at the death of the prior legatee; both those circumstances being permitted, as we have seen, to have that effect, in the case of limitations of real estate. Thus, in one case, (c) a testator, after making his wife executrix, gave her, all his goods and chattels, provided, that if she should *die without issue* by the testator, then, after her decease, 80*l.* *should remain* to the testator's brother: and it was held, that the legacy of 80*l.* was good, one of the principal grounds of the decision being, that a *personal* benefit was intended the legatee, which was inconsistent with the idea of an indefinite failure of issue.

3. Association of contingency personal to

3. Upon the like principle, it seems clear, that the circumstance, of the contingency of a failure of issue being

(a) *Vide supra*, p. 196.

(b) *Vide supra*, p. 212.

(c) *Pinbury v. Elkin*, 1 P. Wms.

563. See observations of Lord Brougham, in 2 Russ. & My. 407, 408.

associated with another contingency, having reference to the age of, or otherwise *personal* to, the ancestor, (*d*) is of equal force, as indicating a failure to be ascertained at the death of such ancestor, with the like circumstance, occurring in gifts of realty. (*e*) And the same remarks, as were, on a former occasion, offered, upon the application of this doctrine, where the subject-matter is realty, may be considered as of equal weight, in reference to gifts of personal estate.

ancestor with that, of failure of his issue.

It is also clear, that the doctrine, by which the word, "or," occurring in limitations of this class, is constructively changed into, "and," is, in all respects, applicable to gifts of personal estate; (*f*) and, therefore, a limitation of leaseholds, to A., and if he die under twenty-one, *or* without issue, to B., will vest the property in A., upon his attainment of the specified age, without regard to a subsequent failure of his issue.

Constructive change of "or" into "and" holds in limitations of personalty.

4. There seems, also, to be no doubt, that the force which belongs to the circumstance, of a gift on failure of issue occurring subsequently to a similar limitation of the same property, in regard to which the failure is clearly restricted, when the subject-matter is real estate, (*g*) attaches equally to the same circumstance, in limitations of personalty. (*h*) But the cautions that were formerly prescribed, in reference to the application of this doctrine (*i*) seem to be equally deserving of attention, when the limitation is of personal estate.

4. Circumstance of limitation occurring subsequently to a gift on failure of issue clearly restricted.

5 and 6. Upon the like ground, there appears to be little question, that whatever inference, in favor of the restrictive construction, arises from the circumstance, of a limita-

5 & 6. Circumstances of superadded contingency of death of issue

(*d*) *Vide supra*, p. 228.

(*e*) *Kirkpatrick v. Kirkpatrick*, 13 Ves. 476.

(*f*) *Mytton v. Boodle*, 6 Sim. 467. 1 Jarm. Wills, 445. See also *Weddell v. Mundy*, 6 Ves. 341; *Green v. Harvey*, 1 Hare, 428.

(*g*) *Vide supra*, p. 240.

(*h*) *Sheppard v. Lessingham*, Amb. 122. *Kirkpatrick v. Kirkpatrick*, 13 Ves. 476. *Mores v. Lord Ormonde*, 1 Russ. 382. *Radford v. Radford*, 1 Keen, 486.

(*i*) *Vide supra*, p. 241, *et seq.*

under specified age, and of failure being of a testator's own issue.

tion being made dependent on the death of the issue under a particular age, in addition to the contingency of a failure of issue, (*k*) or, from the circumstance, of the failure in contemplation being that of a testator's own issue, (*l*) loses none of its strength, or becomes no less applicable, when the subject-matter of the limitations is personal estate. In reference to the former of these circumstances, it must be observed, that, if the superadded contingency contemplate the death of the issue *without issue*, no implication arises in favor of the restrictive construction, (*m*) as was formerly remarked, in regard to gifts of realty. (*n*)

7. Circum-
stance of gift
to a person, if
then living, &c.

7. It is next to be considered, what is the exact force of the circumstance, of a gift of personalty, on failure of issue, being made, to persons *then living*, or to such members of a specified class, *as shall be then living*; and it will, perhaps, be discovered, that the measure of its influence, when the subject-matter is personal estate, is (so far as it can be authoritatively ascertained) superior to that which it enjoys, when the limitation is of realty.

Case of *Brooke*
v. Taylor.

In one case, (*o*) there was a bequest of personal estate, to M. T., and after her death, to the fruit of her body, and *for want of such fruit*, to the testator's brothers and sisters, and their children, *then living*; and it was held, by the Court of B. R., that the limitation-over was valid. This decision has generally (*p*) been considered, to have proceeded, upon the ground, of the words, "then living," referring to a failure of issue at the decease of the first taker; but it may, possibly, have been rested on the circumstance, of the gift-over being referential to issue taking by purchase under the prior limitation to them.

Case of *Gar-*
ratt v. Cockerell.

But the case, which affords most intelligible countenance to the doctrine under consideration, is the very recent one

(*k*) *Vide supra*, p. 243.

(*l*) *Vide supra*, p. 244.

(*m*) *Franks v. Price*, 3 Beav. 182.

(*n*) *Vide supra*, p. 287.

(*o*) *Brooke v. Taylor*, cited, Ca. T. Talb. 23.

(*p*) Ca. T. Talb. 23, 26. Prior on "Issue," 84.

of *Garratt v. Cockerell*, (q) where a testator, being possessed of personal property, by his will, directed, that the interest on his property should be divided into four equal shares: one share to be given to his wife for life, and then to devolve to his children, and the longest liver, in equal shares; the remaining three shares to be divided equally between his three children, and the longest liver, and their heirs; should all his *children die without heirs*, his property, in that case, to be divided equally between the *children of his brothers and sisters, alive on the death of his last child*. All the testator's children died without issue; and, prior to the death of the last surviving child, a decree was pronounced by Lord *Langdale*, M. R., upon a bill filed by that child, *in favor of his title* to the whole of the residue of the testator's estate. Upon the ground of an alleged informality in the proceedings of that suit, a bill was brought, after the death of the surviving son, by one of the persons entitled under the limitation-over. Sir *J. L. Knight Bruce*, V.C., having decided that the word, "heirs," must be read, in the sense of, "issue," proceeded to observe, as follows:—"If the word, 'alive,' and the immediately following words, 'on the death of my last child,' had not been in the will, I must have held, an indefinite failure of issue to have been intended. But then comes the question, what, if any, is the effect of these words upon the construction of the expression, 'die without heirs,' which I read as, 'die without issue?' Can the word, 'alive,' whether applying to the testator's brothers and sisters, or to their children, be properly read, as referring in point of time to the date of the will, or the death of the testator, and not the death of his last surviving child? If it cannot, are the words, 'on the death of my last child,' *applicable to the actual division of the property*, as well as to the period, at which the collateral

(q) 1 You. & Coll. N. C. C. 404. during the argument, and in his judgment, 2 Beav. 564, 567.
 And see the observations of Lord *Langdale*, M. R., in *Carter v. Bentall*,

relatives intended to be benefited are to be ascertained? Are they sufficient, in a case of this kind, to show, that he meant the selected collateral relatives to become entitled in possession, at the death of his last child, if at all? Do they, in short, furnish ground, solid enough to support a restrictive construction, for the phrase, 'die without heirs?'" And, after noticing the case of *Massey v. Hudson*, (hereafter cited and observed upon,) and quoting some observations of Sir *W. Grant*, in that case, his honor further remarked,—“It is consistent with an intention on the testator's part, to fix the time of the death of his last surviving child, as the period at which the number and description of his collateral relatives to be benefited should be ascertained, that he should not have intended their interests to become, necessarily, at the same time, interests in possession. It may be argued, plausibly, perhaps soundly, that the words now under consideration, are not substantially more favorable to the plaintiffs, than the language of the will in *Barlow v. Salter* was, to the unsuccessful party there.” And, again,—“It may, on the other hand, be, without absurdity, if without success, contended, that, even supposing it to be clear, that the word, 'alive,' does not refer in point of time to the date of the will, or the testator's death, it is consistent with a reasonably possible intention on the testator's part, and with fair interpretation of his language, to read the will, as making the time of the death of his last-surviving child, the appointed period of actual division among the collateral relatives, if any, becoming entitled; as providing that their interests were then to be interests in possession, or never to arise. The plaintiffs may farther, not absurdly, if not successfully, contend, that such a restrictive construction, *ut res magis valeat*, is one to be adopted, if rationally possible; one to be favored, and which has, by great judges, and the highest authority, been, in analogous instances, favored; and that, of the cases bearing on this kind of question, some at least proceed upon evidence of intention, not stronger than the

present case affords, in favor of the restrictive construction." The learned judge, then, after noticing the presently-cited case of *Campbell v. Harding*, and showing the distinction in the terms of the limitations in the two cases, remarked, that the will had been brought under the consideration of the Master of the Rolls, and if the view, taken by his Lordship, of the instrument were correct, the limitation, under which the plaintiffs claimed, was void, and they had not, nor ever had, any title. "If, indeed," said his honor, "independently of the decree of the M. R., I could have formed a conclusion, fully satisfactory to my mind, in favor of the plaintiffs' title, I might probably have deemed it my duty, not to give way to the disposition which I must feel, to prefer his judgment, to my own, and to the distrust with which I must regard an opinion of mine, differing from his. But I have been unable to form such a fully satisfactory conclusion. A judicial dissent, on my part, from that which he has adjudicated, ought to be founded on the clear conviction of my mind, that the decision is erroneous. Such a clear conviction I do not feel. On the whole, I must consider Lord *Langdale's* authority, as outweighing any doubts of mine, and deferring to it, and swayed by it, though not fully satisfied, that, in its absence, I should have arrived at the same conclusion, I dismiss the bill."

These observations of the very learned judge fully establish, that, in his opinion, the circumstance, of a gift-over on a dying without issue, being made dependent on the event, of persons *in esse* being then living, is sufficient to justify the restrictive construction. His honor's doubt appears to have had regard, chiefly, to the question, whether, in the case before him, the terms of the gift-over required, not only, that the objects of it should be existing at the time of the death of the survivor of the first takers, but that that must also be considered, as the *period of actual division* among them,—as providing, in fact, "that their interests were then to be interests in possession, or never to arise." In order

Effect and
extent of the
decision in
Garratt v.
Cocherell.

to justify the construction in question, it is, obviously, necessary, that such should be the meaning of the contingency affecting the objects of the ulterior limitation; for if it be merely intended, that the time of the death of the first taker shall be the period, *at which the number and description of the objects of the gift-over shall be ascertained*, the reference to that period does not, necessarily, nor can, properly, give rise to the restrictive construction.

It appears, from the remarks of the Vice Chancellor, that the case of *Garratt v. Cockerell* is pending on appeal before Lord Chancellor *Lyndhurst*; upon whose decision, the integrity of the doctrine under consideration may be said, in some measure, to depend.

It is worthy of observation, that the V. C., in his observations upon the case just considered, expressed his opinion, that the case of *Campbell v. Harding*, noticed presently, would, if the words in the ulterior limitation had corresponded with those of the gift-over, in *Garratt v. Cockerell*, have been decided, in accordance with the doctrine of restrictive construction, grounded on the words, "then living," or the like.

Words "then living" must have reference to the period of first taker's decease, and not to event of failure of issue, generally.

It will have been already apparent, from the passages above quoted from the judgment in *Garratt v. Cockerell*, that if the limitation-over be merely made to such members of a class as shall be living *at the time of the failure of issue*, whenever it may happen, there is no ground whatever, for a construction, restricting the failure to the ancestor's death, so far as it may depend on any such circumstance. Thus, in a late case, (*r*) a testator directed, that in the event of the death of his daughter, C. M., without lawful issue, certain property, which he had bequeathed to her, should be equally divided betwixt his nephews and nieces that *should be living*

(*r*) *Campbell v. Harding*, 2 Russ. & My. 390. S. C. *sub nom. Candy v. Campbell*, 2 Cl. & Fin. 421; 8 Bligh, N. S., 469. And see the earlier cases of *Wright v. Pearson*, Amb.

358; 1 Eden, 119; *Destouches v. Walker*, 2 Eden, 281. *See vide* judgment in *Murray v. Addenbrook*, 4 Russ. 407.

at the time. It was held, both in the Court of Chancery, and in D. P., that the gift-over was void for remoteness. Lord *Brougham*, C., made the following pertinent observations, in reference to the argument which had been urged, that the words of qualification, in the ulterior limitation, restrained the generality of the expression, “decease without lawful issue,” to a failure of issue at the death of C. H. :—
 “It is impossible, according to any fair principle of construction, to carry the case further upon the expression, ‘at the time,’ than upon the word, ‘then,’ used as an adverb of time. The question then resolves itself into this, ought that expression to be construed, as referring to the time of the decease, or to the time of the failure of issue? And that again brings us round to the point, from which the inquiry originally set out, that is to say, to the construction to be put upon the clause of gift itself. Indeed, it is only, by a *petitio principii*, or something very like it, that the least shadow of argument can be founded on the expression, ‘living at the time,’ and that only, by importing it into the clause, from a subsequent part of the will.” And, again,—
 “The time indicated may be, of issue living at the death of the first taker, or it may point to an indefinite failure of issue. If the limitation can be made out, by context, to mean, at the death, you do not want the words, for you have the estate by the limitation. If the other construction is put on them, the case is decided against the limitation-over.”

8. Whenever a term or other chattel is bequeathed to two or more persons, and, in the event of the death of either or any of them, to the *survivors or survivor*, it is said, that the failure of issue referred to will be construed to be, a failure of issue living at the death of the parent; a *personal* benefit being supposed to be intended for the surviving legatees, which is inconsistent with the idea of an indefinite failure of issue.

8. Bequest of chattels to survivors of a class of persons.

As the state of the law on this subject cannot be considered perfectly settled, it will be proper, to take a brief

Case of *Hughes v. Sayer*.

review of the authorities bearing upon it. The first case to be noticed is that of *Hughes v. Sayer*, (s) where J. H., by his will, bequeathed certain shares in his residuary personal estate, to his nephew and niece, P. H. and A. H., and *if either of them should die without children, then, to the survivor*. Upon the question, whether this bequest-over of a personal estate, upon the legatees dying without children, (which was treated as synonymous with *issue*,) was good, or not; Sir J. *Jekyll* was of opinion, that the words, *dying without children*, must be taken to mean, children *living at the death* of the party: that they could not be taken in the other sense, that is, whenever there should be a failure of issue, because the immediate limitation-over was, to the *surviving devisee*, and it was not probable, that if either of the devisees should die leaving issue, the survivors should live so long, as to see a failure of issue, which, in notion of law, was such a limitation, as might endure for ever: and that as, therefore, the testator must be intended to mean, a dying without children living at the death of the parent, the devise-over was good.

Case of *Nicholls v. Skinner*.

The next case is *Nicholls v. Skinner*, (t) (decided in the year following the decision in the case last stated,) where J. N., by his will, devised certain real estate, and also some stock, to his three children, to be divided and paid at their respective ages of twenty-one, or days of marriage, and *if any of them should die before that age or day of marriage*, or if any of them should *die without issue*, then, the share or shares of him or them so dying to go to the *survivors or survivor, and to their heirs*. Upon a bill filed by the eldest son, on his marriage under twenty-one, for an account and payment of his share, it was decreed, that the rents and income of the property should be invested, until the son should *attain twenty-one, when he was to have one-third of the stock*, and the produce thereof. Here, we perceive,

(s) 1 P. Wms. 534.

(t) Pre. Ch. 528 ; better reported in 2 Mer. 135.

the bequest-over of the stock was treated as void, upon the ground (as must be presumed) of the remoteness of the event; and the fact, of the bequest being to the survivors, could not, therefore, have been considered, as restricting the prior words, referring to a failure of issue, to mean, a dying without issue living at the death of the parent. And the reason must be supposed to be, that the circumstance, of the bequest-over being to the survivors *and their heirs*, excluded the notion of a *personal* benefit being intended for the survivors, which was the chief ground of the decision in *Hughes v. Sayer*. There does not appear to have been any direction respecting the *real estate*, in *Nicholls v. Skinner*, which, it should seem, is to be accounted for, by the fact, that, as the son took an estate-tail, by implication, the limitation to the survivors would be good as a remainder, which might be barred by the tenant in tail. One thing seems clear, however:—that *Nicholls v. Skinner* did not (as has been supposed,) (*u*) over-rule *Hughes v. Sayer*, by reason of the great difference between the limitations to the surviving legatees, in the two cases, arising out of the circumstance, of the bequest, in the former, being extended to *the representatives* of the survivors.

In the case of *Atkinson v. Hutchinson*, (*v*) a term was bequeathed to A., for life, and after his decease, to such children as the testator should leave at the time of his decease; and in the event of the death of *any or either of the children without leaving issue, to the survivors of them*; and if all such children should die without leaving any issue, then, to B.: and it was held, that the bequest to B. was good. The decision was not rested upon any supposed effect, of the bequest to the survivors of the children, in controlling the failure of issue expressed, but proceeded upon the exploded distinction, between the bequest of leaseholds, by words, which would give an express estate-tail in freeholds, and

Case of *Atkinson v. Hutchinson*.

(*u*) See argument in *Ranelagh v. Ranelagh*, 2 My. & K. 445. (*v*) 3 P. Wms. 258.

by words, which would give such an estate, only by implication. But the case is noticed here, for the purpose of introducing an observation, of Mr. *Fearne's*, (*w*) that the words, referring to the failure of issue of the legatees, were not strictly applicable to an indefinite failure of issue, *because the first executory limitation was to the survivors*; upon which ground, that learned writer considers, the decision, in favor of the ulterior limitation to B., supportable, irrespectively of the force to be attributed to the word, "leaving."

Case of *Barlow*
v. *Salter*.

The case, next to be noticed, is that of *Barlow v. Salter*, (*x*) in which, a testatrix bequeathed her real and personal estate, to M. V.; "in case she died without issue, all to be divided between the testatrix's four nephews and nieces, N., W., C., and E.; C.'s part, only for life, and her part *to be divided between the survivors*." The principal question for decision was, how far the bequest to C. for life had the effect, of restricting the failure of issue referred to, so as to render all the executory bequests valid. But the connexion of the case with our present subject, arises out of the following remarks of Sir *W. Grant*, M. R., made in the course of his observations, relative to the position of the three persons, who took absolute interests under the Executory bequests, transmissible to their representatives:—"Their right, even to C.'s fourth, will not depend on their being alive at her death; for the word, 'survivors,' as here used, has the same sense as the word, 'others'; as has been frequently decided." This remark seems to deny to a bequest to *survivors* of several legatees, a controlling force, in regard to previous words, referring to a failure of issue of some of them; inasmuch as, by holding, that the title of the executory legatees does not depend on their surviving the failure of issue intended, the sole ground for attributing to them, such a restrictive operation, is taken away.

(*w*) C. R. 480.

(*x*) 17 Ves. 479.

Next in order, is the case of *Massey v. Hudson*, (y) in which, there was a charge of two several legacies of 300*l.* each, upon real estate, in favor of A. and B.; and in case A. or B., should die without issue, then, the whole of the said two legacies to go to the survivor of them, his executors, administrators, or assigns: one of the legatees dying without issue in the testator's lifetime; it was held, that the legacy lapsed. This case, it will be perceived, resembles *Nicholls v. Skinner*, in that, the words of representation, superadded to the limitation to the survivors, excluded all idea of any personal benefit being intended them; and upon that ground the decision was rested. While, however, the particular circumstances of the case did not admit of the words, "die without issue," receiving a restricted interpretation, by force of the bequest-over, Sir *W. Grant* (in singular inconsistency with his own above-quoted remark, in the case of *Barlow v. Salter*,) thus forcibly observed upon the general presumption, arising from a bequest to the survivors of legatees, upon failure of issue of any of them. "*Primâ facie*," said that learned judge, "a bequest-over, to the survivor of two persons, after the death of one without issue, furnishes the presumption, that an indefinite failure of issue could not be in the testator's contemplation; for it will be intended, that the survivor was meant, individually and personally, to enjoy the legacy, and not merely, to take a vested interest, which might or might not be accompanied by actual possession. For, if the survivorship be necessary, only to vest the interest, and to render it transmissible, the objection of remoteness is not at all obviated, and the restrictive presumption does not arise. Now, the addition of the words, 'executors, administrators, or assigns,' excludes the presumption, that it was a mere personal benefit, that was intended for the survivor. For, though there should be no such failure of issue as would enable him personally to take, yet his representatives would be entitled to claim, in

Case of *Massey v. Hudson*.

(y) 2 Mer. 130. And see *Crowder v. Stone*, 3 Russ. 217; but the restrictive construction adopted had no reference to the word, "survivors."

his right, whensoever the failure should happen. It is, therefore, not a personal, but a transmissible interest, and, consequently, the ground fails, on which alone, the words, 'dying without issue,' could have received a restricted interpretation."

Case of
Ranelagh v.
Ranelagh.

The only remaining case to be noticed, is that of *Ranelagh v. Ranelagh*, (z) where, after an *absolute bequest* to one of his daughters, the testator bequeathed four several legacies, to two others of his daughters, and his two younger sons, *for their respective natural lives*; legal interest at five pounds per centum to be paid to all of them, on their legacies, until the testator's eldest son should attain twenty-one; and *in case of the demise of any of the legatees without legitimate issue*, then, his or her proportions *to be divided equally amongst the survivors*. The legatees claimed the absolute interest in their respective legacies, on the ground, that the gift-over, in case of the demise of any of them without issue, was to be referred to an indefinite failure of issue, and, therefore, operated to vest the absolute interest in the first takers. Sir *John Leach*, M. R., said, he adopted the language of Sir *W. Grant*, in *Massey v. Hudson*, and took the rule to be, that if separate legacies are given to two or more persons, with a limitation-over, to the survivor or survivors, in case of the death of either without issue, the presumption, *prima facie*, was, that the testator had not in his contemplation, an indefinite failure of issue; and he also said, that, so far from there being any circumstance, to repel this presumption, in the case under consideration, it was fortified by the fact, that the legacies were, in the first place, given for life only. The case was brought before Lord *Brougham*, on appeal, who, after noticing three circumstances, tending to rebut the construction which would give an absolute interest to the legatees, (*viz.*, first, the testator having *expressly* given an absolute interest to one legatee; secondly, the fixing a *rate of interest* which

(z) 2 My. & K. 441. And see My. 408; and *Leeming v. Sherratt*, dicta of Lord *Brougham*, 2 Russ. & 1 Hare, 14.

the legatees were to have, for a given period; and, thirdly, the bequests of the legacies being all expressly for *the lives* of the legatees,) said, that they greatly favored the opinion, that the word, “survivors,” was used, in its plain and obvious sense, as meaning, such of the four individuals named as should be living, when any of them should happen to die; and that, if such should be the meaning of the word, then it was clear, that the failure of issue was at once restricted, to failure of issue living at the death of the deceased legatee. His lordship also took occasion to observe, that his decision rested upon the special circumstances noticed, and that, therefore, it was not a decision upon the general principle, and did not, indeed, go so far towards it, as either the *doctrine* of Sir *W. Grant*, in *Massey v. Hudson*, or the decision of Sir *J. Jekyll*, in *Hughes v. Sayer*.

It is difficult, to arrive at any positive conclusion, from the foregoing authorities, upon the question under consideration. On the one hand, the decision in *Hughes v. Sayer*, (unaffected, as we have seen, by *Nicholls v. Skinner*,) the opinion of Mr. *Fearne*, in regard to the case of *Atkinson v. Hutchinson*, and the *dicta* of Sir *W. Grant*, in the case of *Massey v. Hudson*, and of Sir *John Leach*, in *Ranelagh v. Ranelagh*, strongly support the doctrine, that a gift to survivors of several persons, upon the death of any of them without issue, restricts the failure of issue, to the death of the parent; while, at the same time, the observation of Sir *W. Grant*, in *Barlow v. Salter*, (albeit irreconcilable with his subsequent remarks, in *Massey v. Hudson*,) and the guarded and cautious language of Lord *Brougham*, in *Ranelagh v. Ranelagh*, with his apparent eagerness to rest his decision of the case, upon other grounds than the supposed rule, seem to require hesitation in the adoption of the doctrine in question, as a settled rule of construction. It may be observed, however, that the preponderance of *authority* is supported by the *principle* of law, which seeks to establish Executory bequests of personal estate, depending upon a failure of issue,

General result
of foregoing
authorities on
this point.

by taking advantage of any circumstances, connected with the limitations, which may reasonably be understood to indicate, that the failure intended was, a dying without issue living at the death.

Words of representation superadded to gift to survivors negative any inference in favor of restrictive construction.

Of course, it is perfectly clear, that wherever words of representation (such as, "executors and administrators,") are superadded to the limitation to the survivors, all presumption, of personal or individual enjoyment being intended for them, is excluded; and, in such case, therefore, there is no ground for giving the words, "die without issue," &c., a restricted interpretation.

If gift to survivors has the effect of restricting the failure, subsequent limitation, on failure of issue of all members of the class, subject to same construction.

We have here to observe, in connexion with the subject, of the force to be attributed to a limitation to the survivors of several legatees, in regard to words, importing a failure of issue of one or more of them, that it should seem, if, by virtue of such a limitation, the failure of issue is restricted to the death of the parent, so as to enable the bequest to the surviving legatees to take effect, a *subsequent* bequest-over, on failure of issue of *all* the legatees, by the *same words* as are used to introduce the *cross*-limitation, will be equally good; as it is but reasonable, to give the same words, the same construction, in an ulterior limitation, as they bear, in a limitation immediately preceding, applied to the same subject. (a)

9. Circumstance of ulterior limitation being introduced by words, "after his decease," &c.

9. It is well established, that the words, "at" or "after his decease," introduced in a limitation-over of personal estate, to take effect upon the death and default of issue of a prior legatee, have the effect, of restraining the failure of issue, to the time of the death of the legatee.

Thus, in a case before cited, (b) a testator, after making his wife executrix, bequeathed to her, all his goods and chattels, provided, that if she should die without issue by the testator, *then, after her decease*, 80*l.* should remain to

(a) *Vide supra*, p. 242. *Radford v. Radford*, 1 Keen, 486. And see *F. C. R.* 481.

(b) *Finbury v. Elkin*, 1 P. Wms. 563. *Sed vide*, observations of Lord *Hardwicke*, 1 Ves. sr. 237, 238.

the testator's brother: and it was held, that the bequest-over was good; the words, *then after* (i. e. *immediately after*, (c)) the *decease* of the testator's wife, being repugnant, if the dying without issue should be taken in the sense, *whenever* there should be a failure of issue.

So, also, where (d) a testator bequeathed a leasehold estate, to his wife, M. P., for life, and, after her decease, to his son, S. P., and the heirs of his body, and their heirs and assigns for ever; but in default of such issue, then, *after his decease*, to go to T. W., his heirs and assigns; the question was, whether the Executory bequest to T. W. was valid: and the Court of B. R., on a case sent from Chancery, certified, that they were of opinion, that the entire and absolute interest in the term passed to T. W., on the ground, that the words, "but in default of such issue, then, after his decease, to T. W.," showed, that the testator's intention was, that, if S. P. did not leave any issue at his death, the subsequent limitation should take effect.

Yet again, where (e) a testator bequeathed leasehold property, to his daughter and her children, and in default of such issue, *and in case of her death*, to A. and B.; upon the question, whether the limitation-over was too remote, Sir *Thomas Plumer*, M. R., held, that the words, "in default of such issue," must be taken in connexion with those that follow; *viz.*, "in case of her death;" in which case, they referred to the same period, and meant, a failure of issue at her death, whereupon the limitation-over was to take effect.

And, once more, where (f) a testator by his will bequeathed one-fourth part of his personal estate, to his son,

(c) *Sed vide*, as to this, observations of Sir *W. Grant*, in *Donn v. Penny*, 19 Ves. 548.

(d) *Wilkinson v. South*, 7 T. R. 555.

(e) *Gawler v. Cadby*, Jac. 346.

And see also the cases of *Paine v. Stratton*, cited 2 Atk. 647, and reported, 3 Bro. Parl. Ca. 257; and *Trotter v. Oswald*, 1 Cox, 317.

(f) *Rackstraw v. Vile*, 1 Sim. & Stu. 604.

and, by a codicil, declared, that that share should be only for the natural life of the son and his wife, *provided they had no issue*, and, *at their death*, should fall into the residue; it was held, by Sir *J. Leach*, V. C., that the failure of issue was restricted to the decease of the survivor of the son and his wife, by force of the words, by which the ulterior disposition was introduced.

But, "after him," not attended by any restrictive force.

But the words, "after him," will not have the same effect, of confining previous general words, referring to a failure of issue, as the expression, "after his decease." Thus, upon (*g*) a bequest of real and personal estate, to R. D., and his male issue, and for want of such issue, *after him*, to W. D., and his male issue, and so, in like manner, to others; the question was, whether the above words gave the absolute interest in the personalty, to R. D., or a life interest only, with an Executory bequest to W. D., in the event of R. D.'s death, without leaving male issue; and Sir *W. Grant*, after referring to *Pinbury v. Elkin*, said, that there was no determinate period assigned, *viz.*, the death of the first taker, as in that case; and that there were no circumstances arising upon fair demonstration, by which alone the general sense of the words, "for want of issue," could be varied. (*h*)

10. Circumstance of limitation on failure of issue being preceded by power of appointment among issue, given to first taker.

10. It occurs, in the next place, to notice another circumstance, which has been considered sufficient, to give a restricted construction to words, importing a failure of issue, although, perhaps, in some respects, its consideration belongs, more properly, to the division of our subject, appropriated to the construction, making the contingency of a failure of issue, *referential* to children or issue taking under a preceding gift. The restrictive circumstance in question is that, of a power of appointment or selection, among the issue of the first taker, being vested in him; in virtue of which, there is an implied gift to the issue living at his decease. (*i*)

(*g*) *Donn v. Penny*, 1 Mer. 20.

v. Bensley, 1 Bro. C. C. 190.

(*h*) *Per Lord Thurlow*, in *Bigge*

(*i*) 2 Jarm. Pow. Dev. 590.

This doctrine proceeds on a rule of law, that where a power is given in terms, which show, that the title of the objects of it to the property is not intended, to be dependent on the exercise of the discretion with which the first taker is invested, but that he is merely to have a power of apportioning the shares or interests of the objects, they will take, in the event of and notwithstanding default in execution of the power by the donee of it. (*k*)

Grounds of restrictive construction from this circumstance.

In the case supposed, therefore, of a right of selection among the issue of the first taker, the word, "issue," does not receive its primary indefinite signification, but is construed to mean, issue living at the first taker's death, being the period, when an actual division of the property must take place, either according to the appointment of the first taker, or in the proportions, in which the issue are naturally entitled, in default of any explicit direction or gift.

The word, "issue," being thus confined to the signification of issue living at the death of the ancestor, the restricted construction of the words introducing the gift-over is completed, by holding them to refer to the issue entitled under the preceding implied gift; the result of which construction is, the validity of the ulterior limitation, as not depending on too remote an event.

It will be observed, this doctrine assumes, that the power and the implied gift are co-extensive, in regard to the class of issue comprehended by each; *i. e.*, as including only issue living at the first taker's death. (*l*) And this, it is evident, is indispensable, for, as the implication of a gift is grounded on the inference derived from the terms of the power, if that power embrace issue, not to be necessarily ascertained at the death of the ancestor, but at any

Power must be understood to be confined to issue living at ancestor's decease.

Powell's note to F. Ex. Dev. 188. 2 *Rop. Leg.* 401. Prior on "Issue," 117, 131.

(*k*) 2 *Sug. Pow.* 177, 184.

(*l*) See 2 *Jarm. Pow. Dev.* 592.

But see one of the authorities for the doctrine in question cited in 1 *Sug. Pow.* 499, as showing, that *all issue within the limits of remoteness* were embraced by the power.

time within the allowed limits of remoteness, all ground for restricting the implied gift, to issue living at the ancestor's decease, is taken away, and all reasonable foundation for the gift itself, destroyed. The supposition, that, in these cases, the power extends to any issue coming into existence within the prescribed period, as has been observed, (m) not only imputes to the judges, who decided the cases that are to be cited, an inaccuracy of statement in regard to the limits of the Rule against Perpetuities, which allows a term of twenty-one years in addition to a life, but is entirely inconsistent with their restriction of the implied gift, and the words introducing the limitation-over, to issue living at the death, for which there was no pretext, unless the power was so confined, and their effect, if not restricted, must inevitably have been, to make the first taker tenant in tail, or to give him the absolute interest, which is the conclusion against which all the judges' reasoning is directed.

But it is unnecessary, further to discuss this question. Suffice it to affirm, that unless the word, "issue," be understood to be confined to issue living at the death of the ancestor, the circumstance, of the limitation-over being preceded by a power of appointment, will be of no force to support such limitation; but that, whenever that word is so restricted, the ulterior gift will be valid, as depending on a failure of issue at the death of the first taker.

Case of *Target*
v. *Gaunt*.

It remains, to state the authorities for this doctrine. The first is the case of *Target v. Gaunt*, (n) where a testator bequeathed a term of years, to his son, A., for life, and after his decease, to such of A.'s issue as he should by will appoint, but if A. died *without issue*, then, to B.; and A. died without leaving issue: it was determined, that the limitation to B. was good, and, as it seems, upon the ground, that the power of appointment allowed to A., among his issue, manifested an intention in the testator,

(m) 2 Jarm. Pow. 592. Dev.

(n) 1 P. Wms. 432.

to use the word, "issue," in the sense of, *such issue as A. should or might appoint* the term to, which must be intended, *issue living at his death.*

So, also, in the case of *Hockley v. Mawbey*, (o) a testator bequeathed freehold and leasehold estates, to his wife, for life, and after her decease, unto his son, R., *and to his issue lawfully begotten or to be begotten, to be divided amongst them as R. should think fit*; and if R. should happen to die without issue lawfully begotten, the estates were to be sold, and the produce divided between the testator's nephews and nieces: R. died without issue. It was held, that the limitation-over, upon the son's dying without issue, was not too remote; and, in support of this construction, reliance was placed upon the power of division given to the son, which, it was said, would be exercised and carried into effect at his death, and, to that period, therefore, the words, "die without issue," must be referred.

Case of *Hockley v. Mawbey.*

The doctrine under consideration has, also, received the assent of Lord *Brougham*, expressed in his judgment in the late case of *Campbell v. Harding*; (p) although his lordship is reported to have rested that concurrence, upon grounds, by no means so intelligible as those, which have been generally supposed to form the basis of the doctrine. The Lord Chancellor's observations are thus stated:—The circumstance, of a limitation, on failure of issue, being preceded by a power of appointment, "was a strong indication, that the legatee-over was to be a person, of whom the first taker is cognizant, some person, therefore, *in esse* during his lifetime, and, consequently, limiting the generality of the expression."

Lord *Brougham's* dictum in *Campbell v. Harding.*

In addition to these authorities, is to be mentioned, the very recent case of *Leeming v. Sherratt*, (q) where a testator bequeathed to six of his children, 1000*l.*, each, to be

Case of *Leeming v. Sherratt.*

(o) 3 Bro. C. C. 82; 1 Ves. jr. 143. And see also the case of *Attorney-General v. Bayley*, 2 Bro. C. C. 553.

(p) 2 Russ. & My. 390.

(q) 2 Hare, 14. And see *Keating v. Keating*, 2 Ll. & Go., temp. Plunkett, 291. See *vide*, *Croly v. Croly*,

paid on their respectively attaining twenty-one, excepting to such as were girls, in which cases, he desired one-half to be placed out at interest, the interest to be paid to them, and the *principal disposed of, in such manner as they might direct, to their issue*; but in case they should die without issue, over. One of the questions, in a suit for the administration of the testator's estate, being, as to the meaning to be attached to the expression, "in case they die without issue," it was held, by Sir *James Wigram*, V. C., that those words must be construed, with reference to the issue before spoken of, as if the words were, "in case they die without *such issue*;" and that the *issue before spoken of did not mean issue indefinitely*: in support of which construction, his honor cited the above-mentioned case of *Target v. Gaunt*.

Observation on these cases.

It is observable, that, in the cases which have been adduced, the intention of the testator, that *the issue* referred to *should take, whether any appointment were made, or not*, was manifested by the very words which give rise to our present inquiries, *viz.*, "in default of issue;" (*r*) for, where a gift is intended to be dependent, simply on the execution or non-execution of an appointment, irrespective of the contingency, of the existence of the objects of it, that event is, of course, contemplated, in terms, by the words introducing the limitation-over.

Necessary, that power should raise an implied gift to issue living at ancestor's death.

But, in order to support a restricted construction, upon the force of a power of appointment among the issue, it is absolutely necessary, that the power should be such, as to raise an implied gift to the issue, in whose favor it may be exercised, in default of any execution of the power. If the power be a mere authority, the exercise of which rests in the discretion of the donee, it is obvious, its insertion can effect no change in the construction of the words introducing the ulterior gift.

Batty, 1; which case seems utterly cited in the text.

irreconcilable with the authorities

(*r*) See 2 Sug. Pow. 184.

Thus, in the recent case of *Simmons v. Simmons*, (s) Case of *Simmons v. Simmons*, exemplifying this. W. S., by his will, devised his real and personal estates, to his brother, G. S., upon trust for the benefit of the testator's daughter, E. S., for life, for her separate use; *at her decease, she might be at liberty to will the same to her issue, as she might think fit*; but in case of her dying without issue, the testator devised the property, to G. S. and A. S., for their lives; and if G. S. should die before E. S., to the children of G. S. Upon the question, what interest E. S. took under the will, it was argued, that the words, "in case of her dying without issue," meant, in case of her leaving no issue to whom she might have willed the property, which, with other circumstances, showed, that the testator looked at the time of his daughter's death, as the period of the number and description of the parties in remainder being determined. Sir *L. Shadwell*, V. C., however, held, that the daughter took an estate-tail in the realty, and an absolute interest in the personal estate; thereby showing, that, in his opinion, an indefinite failure of issue of the daughter was intended. (t)

The distinction under notice may, on the first view, seem at variance with the decision in the case of *Bruce v. Bainbridge*, (u) Case of *Bruce v. Bainbridge*. decided in C. B., in the year, 1820. In that case, L. B. devised several estates, to his nephews, G. E. B., L. B., and C. B., respectively, and, after some intermediate dispositions, proceeded thus:—"And further, it is my will, that my said nephews shall not be entitled

(s) 8 Sim. 22.

(t) In whatever view, the decision in this case is regarded, it seems difficult, to escape the conclusion, that technical legal import was adhered to, in disparagement of unambiguously expressed intention. Besides the circumstance mentioned in the text, the fact of the first devise being expressly *for life*, and to the *separate use* of the devisee, of the first devise-over being

of *life-estates* only, and of the substituted devise-over being to take effect, in the event of the death of G. S., *prior to the decease* of the person, the failure of whose issue was referred to, each and all, pointed to a restrictive interpretation of the words, "dying without issue," as opposed to that adopted by the Court.

(u) 2 Brod. & Bing. 123.

to the actual seisin or possession of the several estates herein devised to them, until they shall respectively attain their several ages of twenty-one years; and, that the issues and profits thereof, over and above what shall be thought necessary for their respective maintenance and education, shall annually accumulate for their respective uses, so soon as they shall attain the several ages aforesaid; and, if one or more of my said nephews shall happen to die before he or they shall attain his or their age, or ages of twenty-one years as aforesaid, then, and in that case, I devise the estate and estates hereinbefore devised to him or them so dying, to my nephew, J. B., and his issue lawfully begotten; and, if the said J. shall happen to die without issue, then, I devise the estates, which he shall derive or be entitled to under this my will, to his next brother, G. E. B.; *and, for default of such issue in the said G.*, then, the estates of the said J. and G. to go to and vest in my nephew, L., and his issue as aforesaid; and, in default of such issue in the said L., then, the estates of the said J., G., and L., to go to and vest in my nephew, C., and his issue as aforesaid;" with ulterior limitations, in favor of another nephew and niece of the testator, and their issue; the clause of gifts concluding thus:—"It being the *intent and meaning of this my will*, to prevent waste, by making the several children of my brother, G., deceased, *tenants for life only*." The testator then declared it was his will, that such of his said nephews as should marry, *should be authorized* thereby to make reasonable settlements, upon such wives as they and each of them should take, and to *dispose of their respective estates, to and among the issue of such marriages*, in such manner as they should think proper to limit and appoint the same. On a case from Chancery, as to the interest taken by G. E. B., under these devises, it was certified, by the Court of C. B., that he took an estate for life only.

Observations

To account for this decision, it has been ingeniously

suggested by a learned writer, (v) that it was evident, the testator considered, he had given some estate to the issue of G. E. B., by reason of the expression, "for default of such issue in the said G.," used by the testator, although he had, in fact, made no previous gift to, nor even mentioned, the issue of that nephew; and that, to render this language consistent, the accidental omission of some *prior limitation to the issue* of G. E. B. must be supposed; and that no limitation could be more naturally supplied, than that which was afterwards, in effect, contained in the will, *vis.*, *to such of his issue as G. should appoint*. But it may be asked,—why this tortuous and strained interpretation of the testator's language? this inverting of the order of his dispositions? Was it not sufficient, in order to rebut the construction of the nephew taking an estate-tail, that the words, "in default of such issue," in the gift-over, were absolutely without meaning, and nugatory? and that there was, *in fact*, no limitation-over on failure of issue of the nephew, neither previous nor subsequent to the power of appointment among the issue? How could the full-meaning word, "such," be rejected, without violence to the language used by the testator? and, if retained, of what force could the gift-over be, in regard to the raising an estate-tail? But, moreover, the whole scheme of disposition in the will, afforded no analogy, upon which to rest an interpolated gift, such as that suggested. As regards all the other nephews, the limitations were, to them *and their issue*, without any mention of a power of appointment, or other collateral circumstance or contingency. It is evident, a similar gift was intended, in the case of the nephew, G. E. B., but was inadvertently omitted; and, being omitted, the limitation-over, otherwise suitable, became irremediably senseless. It was certain, that, as the will stood, no estate-tail could be raised in G. E. B.; and resort to adverse ar-

upon *Bruce v. Bainbridge*.

(v) Prior on "Issue," 125.

gument, founded on the power of appointment among the issue, was, therefore, unnecessary, even were any such argument sustainable. But none such could have been sustained, for the power was, clearly, nothing more than an authority, and raised no gift by implication to the issue, as purchasers. Independently of that, however, any argument from the power, would have been objectionable, seeing that, as regards the interests of the other devisees, it operated nothing, there being *express* limitations to their respective issue; which (as will be presently shown,) negatives any controlling influence belonging to the power; and it would have been a strange decision, that should make that power serve to introduce an isolated construction, in reference to one of several gifts, contemplated by it as a single class or continuous series, and that, too, from a circumstance arising in the mere neglect of the transcriber.

The case of *Bruce v. Bainbridge*, therefore, is not irreconcilable with that of *Simmons v. Simmons*, and does not affect the rule, that, to support the restricted construction of a failure of issue, founded on the circumstance, of the ancestor having a power of appointment among the issue, the case must be one, in which the issue living at his decease would be entitled under an implied gift, in default of appointment: and *that*, because the case, in reality, forms no authority *for* the doctrine we have been considering.

It may be observed, that there seems no ground, for confining the application of this doctrine, to limitations of personalty, although, in the instances furnished by the authorities, with the exception of *Hockley v. Mawbey*, the subject-matter has been personal estate, and notwithstanding a different view seems to have been sometimes entertained. (v)

It must be noted, that the restrictive construction, grounded on the circumstance of a power of appointment among the issue, has no application whatever to the case, of an *ex-*

Doctrine seemingly applicable to limitations of realty as well as of personalty.

Rule does not apply to cases of *express* limitations to issue.

(v) See 2 Jarm. Pow. Dev. 590.

press limitation to issue of a prior tenant for life, which happens to be preceded by a power of appointment in favor of children or issue, for then, according to the only rational construction, the first taker has an estate-tail, or, in the case of personalty, the absolute interest, in the same manner, as if no such power had been inserted. (w)

11. A circumstance, to which, as we have before seen, importance has been attached, in putting an interpretation upon words importing a failure of issue, is that, of the gift to the parent or other ancestor being *expressly for life*.

11. Circumstance of intention to restrict first taker to a life interest.

Thus, in the case of *Smith v. Clover*, (x) A., after giving several legacies, devised, that the rest and residue of her estate unbequeathed, should be put forth to interest, by her executors, and that one-half should be paid to the testatrix's sister, B., during her life, and the other half of the interest, unto her daughter, C., and she to have one-half of the testatrix's household goods, and after her mother's decease, to have all the interest during her life; and the testatrix's will was, that if the said B. should die without issue of her body, the principal of the residue should be divided equally between D. and E., and such children as were or should be born of their bodies, then living. The question was, as to the validity of the bequest to D. and E.; and it was determined, that that limitation was good, upon the ground of the distinction between the bequest of the *interest* of money, and the bequest of the *money itself*, the former furnishing *evidence* of the testator's *intention*, to use the words, "dying without issue," in a sense, which would not carry the whole interest to the legatee for life. It has, indeed, been decided, (y) that, in the case of a bequest of the *interest* of a

Case of *Smith v. Clover*.

Observations upon *Smith v. Clover*.

(w) See *Seale v. Barter*, 2 Bos. & Pull. 486; *Jesson v. Wright*, 2 Bligh, 1; *Doe d. Cole v. Goldsmith*, 2 Marsh, 517; 7 Taunt. 209; *Smith v. Death*, 5 Madd. 371; 2 Jarm. Pow. Dev. 593; *Hayes' Enquiry*, &c., 42—55; Prior on "Issue," 119, 120.

(x) 2 Ch. Rep. 410; 2 Vern. 38.

(y) *Butterfield v. Butterfield*, 1 Ves. sr. 133, 154. *Tothill v. Pitt*, 1 Madd. 488; S. C. *sub nom. Earl of Chatham v. Daw Tothill*, 6 Bro. Parl. Ca. 450. *Glover v. Strothoff*, 2 Bro. C. C. 33. *Attorney-General v. Bright*, 2 Keen, 57.

personal fund, for life, and of the *principal*, after the decease of the legatee for life, to the heirs of his body, the circumstance, of the prior bequest being confined to the life of the legatee, does not prevent the whole fund vesting absolutely in him, under the bequest to his issue, conjoined with that to himself: and it has, in consequence, been sometimes (z) supposed, that the rule laid down in *Smith v. Clever*, does not now obtain. But it is conceived, the two cases are perfectly distinct:—in that of a bequest, expressly for life, and, afterwards, to the issue of the legatee, the mere circumstance, of the prior bequest being of a life interest only, cannot properly have the effect of preventing the whole fund vesting in the first taker, any more than, the fact, of a devise of real estate being expressly for life, prevents a fee-tail passing to the devisee, under a subsequent devise to the heirs of his body, by virtue of the *Rule in Shelley's case*; by analogy to which rule, the absolute interest, in the case supposed, is held to vest in the legatee for life: but, in the case of a bequest for life, and, in default of issue of the legatee, over, any enlargement of his interest must take effect entirely by *implication*, founded on a construction, put upon the words, referring to the failure of his issue; and such implication may well be repelled, by the manifestation of a contrary intention, afforded, in some degree, by the circumstance, of the prior bequest being expressly confined to the life of the legatee. (a)

Case of *Ranelagh v. Ranelagh*.

In addition to the case of *Smith v. Clever*, in support of the presumption we are considering, it will be remembered, that in the before-cited case of *Ranelagh v. Ranelagh*, (b) Lord Chancellor *Brougham* laid great stress upon the fact, of the first bequests being of life-interests only, as an argument against the construction contended for in that case, which would give the absolute interest in the legacy to the legatees for life.

(z) F. C. R. 475, 486.

pp. 270, 271.

(a) And see the observations of Mr.

(b) 2 My. & K. 441.

Powell, in his edition of F. Ex. Dev.,

The presumption, in favor of a restricted interpretation of words, referring to a failure of issue, arising from the circumstance, of the prior bequest being confined to the life of the ancestor, is based, it will be perceived, solely upon a regard to the *consequences* of a contrary construction, which involves a practical obliteration of a portion of the gift. But this presumption will not, it would seem, be allowed, except as *auxiliary* to other circumstances, of a like tendency; for it is clear, (as has been formerly remarked,) that a limitation of a term or other chattel, to a person, for life, and if he die without issue, over, simply operates to vest the absolute interest in the chattel, in the prior legatee.

Extent of present influence of this doctrine.

12. In addition to the various expressions and circumstances, the influence of which, upon words referring to a failure of issue, has hitherto engaged our attention, instances have, from time to time, occurred, of others, of a peculiar character, and not properly belonging to any of the classes before enumerated, one of which, it will not be well, to leave wholly unnoticed.

12. Case of *Keily v. Fowler*.

The case in question, is that of *Keily v. Fowler*, (c) determined in Dom. Proc., on appeal from the Court of Chancery in Ireland. W. C. bequeathed to his daughter, all his worldly substance, lands, stock, corn, debts, and household goods; provided she married by the consent of his executors; and, after naming A. and B. his executors, the testator appointed, that in case his said daughter should marry without consent, *or die without issue*, all his said substance, &c., should *return back to his executors*, to be *by them distributed*, in manner following: *viz.*, to his nephew, J. D., 100*l.*, to H. G., 50*l.*, to each of his executors afore-said, 50*l.*, to his daughter, twenty cows and a horse only, and the remainder to be equally divided amongst the children of the testator's sister, F. F. And upon the question, of the validity of the limitation-over after the death of the

Nature of
the decision in
Keily v. Fowler.

testator's daughter without issue, the House of Lords (affirming the decree of the Court below) held, that the bequest was good, as being to take effect, on the death of the daughter *without issue then living*. This decision appears to have proceeded on the ground, that, by the direction, that the property should return to the executors, to be distributed by them, the testator placed a *personal trust and confidence* in the executors, and showed, that he considered the events, on which the limitation-over was to take effect, to be such, as, if they happened at all, would, in all probability, so happen, in the lifetime of his executors, or one of them; which was inconsistent with the idea of an indefinite failure of issue. (d) In the arguments, too, great stress was laid on the circumstance, of the limitation-over being made to the executors named in the will, and of a personal trust being reposed in them, in support of a construction, restricting the failure of issue to the time of the first legatee's death. The legacies and other provisions, contingent on the failure of issue, were, also, favorable to the construction adopted.

In addition to the proper weight of this case, it has been adhered to, as one of no less authority at the present day, by eminent judges. For example, Lord *Brougham*, in a recent case, (e) thus referred to this decision, and the grounds of it: —“The Court laid hold of the circumstance of it being a personal trust, the duties imposed on the executors strongly implying a *delectus personarum*: the very peculiar form of the direction, that the property should return back to the executors, in order to be divided, and the nature of the chattels to be given to the daughter, *vis.*, twenty cows and one horse, in the event of the limitation-

(d) F. C. R. 483. And see the observations of Mr. Justice *Buller*, in *Doe v. Lyde*, 1 T. R. 537, where that learned judge refers to a full note of the judgment in *Keily v. Fowler*; from which it appears, that the peculiar

circumstances attending the limitation-over formed the chief ground of the decision.

(e) *Campbell v. Harding*, 2 Russ. & My. 408, 409.

over taking effect, (*f*) were also material features in the case." And, again, (*g*)—"In *Keily v. Fowler*, the subject of the gift was to *return back* to the very identical *personæ delectæ*, the executors, and was to be actually provided, in terms clearly contemplating and expressing a desire, that it should revert to them personally." And, so, Sir *J. L. Knight Bruce*, V. C., in a still later case, (*h*) after remarking, that the case of *Keily v. Fowler*, was decided in the time of Lord Chancellor *Camden*, and, it was to be supposed, with his concurrence, and, certainly, in accordance with the unanimous opinion of the consulted judges, after time taken to consider, and that it was, *in all respects, of the very highest authority*, thus forcibly showed the real extent and meaning of the decision. "Considering that, in that case," said his honor, "the executors had no discretion to exercise, as to the mode of distributing the property; that the daughter might have died leaving issue, which might afterwards have failed, leaving the original executors; that, on the other hand, the daughter might have survived the executors, and might afterwards have died without leaving issue, in which event, the children of the sister or their representatives must, probably, have been held entitled to take, whether those children did, or did not, survive the daughter, it may, I think, be fairly doubted, whether the circumstances, held to be sufficient to repel the presumption of the unrestricted sense of the words, 'die without issue,' were more than exceedingly slight circumstances." And the learned judge then quoted an observation of *Wilmot*, C. J., on delivering

(*f*) In reference to this argument, it has been aptly observed,— "This reason is not so clear; the daughter was not to have these, only in the event of her dying without issue: on the contrary, it seems to have been the testator's intention, to give them to her, upon every contingency; probably, to prevent the inconvenience of such property being

held in trust; and it, therefore, comes to the same thing, as if he had specifically bequeathed them to his daughter, and excepted them out of the residuary devise." Prior on "Issue," 86, 87. See also 2 Jarm. Pow. Dev. 589.

(*g*) *Ib.* 413.

(*h*) *Garratt v. Cockrell*, 1 You. & Coll., N. C. C., 505, 506.

his opinion upon the case, in the House of Lords, to show, that the case stood upon the evidence of the testator's intention arising out of the will, and that it was unnecessary and useless, to resort to decided cases, which did not perfectly coincide, for that a will was "the picture of a man's mind."

The case of *Keily v. Fowler* must, therefore, be treated, as one, decided upon the strength of the *indicia* of intention furnished by the will, which were, undeniably, unfavorable to the supposition, that the testator had in his contemplation, an event of indefinite expectancy. Strictures may be made upon the force of any particular circumstance or expression, and their individual sufficiency may be questioned; (i) but if an intelligible presumption may be founded on the whole, adverse to the construction of a general failure, there can be no doubt, that effect may legally be given to that presumption.

13. Extrinsic circumstances, without concurring expression or circumstance in the instrument, of no force.

13. But, notwithstanding the inclination of the Courts, to pay attention to circumstances, favorable to the construction of a restricted failure of issue, in regard to limitations of personal estate, it is clear, that mere presumption of intention, drawn from extrinsic circumstances, *unless some expression of the intention, or some circumstance, from which it may be inferred, be found in the instrument*, is of no value. (j) There must be something apparent upon the face of the limitations themselves, evincing an intention, not merely, that the gift in question should take effect, but that it should be dependent, on the event of a dying without issue, not indefinite or unrestricted.

The following pointed observations of Lord *Brougham* manifest the unwillingness of the judges, to expound and decide the construction of instruments, upon circumstances wholly independent of them. "I will not," said his lordship, in a recent case, (k) "be stopped by a colon or a

(i) Observations of Lord *Thurlow*, in *Bigge v. Bensley*, 1 Bro. C. C. 190. 2 Jarm. Pow. Dev. 589.

ham, in 2 Russ. & My. 414.

(k) *Campbell v. Harding*, 2 Russ. & My. 390.

(j) See observations of Lord *Brough-*

period : if the next succeeding sentence is manifestly a substantial part of the bequest, I shall treat it like an act of Parliament, which has no stops, and read it as a part of the bequest ; but I will not go into another branch of the will, for the purpose of showing a general intention. Of what use is it, to look at intention, in these cases? Did any man ever make a will, in which he wished, that an Executory devise should fail? The very making of the will shows the contrary.” (l) And again, (referring to the particular case then under consideration)—“ The testator’s intention, that the ulterior limitation should take effect, was just as plain, as if he had used the words, ‘ living at the time of the first taker’s death :’ but a limitation, after the failure of issue generally is an event not sanctioned by the law : it would tend, were it effectuated, to create a perpetuity ; and, for that reason, and not with reference to intention, it is not permitted.”

Accordingly, in the case of *Campbell v. Harding* ; (m) ^{Instance of this.} where the first legatee was a natural child of the testator, and there was a limitation-over, on her death without issue, and it was argued, that the testator must be presumed to have intended, a failure of issue at her death, in order to provide for the, otherwise not improbable, contingency, of the legacy falling to the Crown, by the legatee’s death intestate and without issue ; it was decided, that no inference, in favor of the restricted construction, was derivable from the circumstance in question, as it was, simply and entirely, ex-

(l) Perhaps, Lord *Brougham* has here expressed himself rather too strongly, against looking at any other part of the instrument, than that, which relates to the gift, the construction of which is in question ; for it is undeniable, that the Courts are in the constant habit of discovering inferences of intention, by means of comparison and contrast, drawn from

different parts of the instrument, although not all applicable to the particular subject-matter. See, as examples, the judgments in *Dalesell v. Welch*, 2 Sim. 319 ; *Ridgeway v. Muncketrick*, 1 Dr. & War. 84 ; and *Leeming v. Sherratt*, 1 Hare, 17. See also 2 Jarm. Wills. 356, n.

(m) 2 Russ. & My. 390.

trinsic to the will, and not supported by any expression contained therein.

14. Adverbs
"then" and
"when"
insufficient.

14. Again, in order to the contingency of a dying without issue being restrained to mean, a failure at the time of the death, it must clearly appear, that the words, to which such a restrictive force is attributed, have a reference to that particular period, as the time, when the ulterior limitation is intended to take effect.

Words, therefore, which are capable of being referred to the general event of a failure of issue, at whatever time it may happen, rather than, to that of its happening, at the precise period of the death of the first taker, are of too ambiguous an import, to satisfy the required measure of significance. Such are, the adverbs, "then," and, "when," unaccompanied by any expression, pointing to the death of the first taker, as their immediate antecedent. In such cases, as has been well said, (*n*) "then," is a particle of inference, connecting the consequence with the premises, and meaning, "in that event," or, "if that happens;" and it is, therefore, a word of reasoning, rather than, of time.

Authorities
showing this.

Thus, where (*o*) a testator devised as follows:—"M. D., I make my sole heir and executrix, and if she die without issue, *then*, to go to L. B.;" Lord *Hardwicke* said, that the word, "then," though, grammatically, an adverb of time, in limitations of estates and framing of contingencies, was a word of reference, and related to the determination of the first limitation, when the contingency arises, and that, in the case before him, it did not ascertain the point of time, but was merely relative to the determination of the limitation to M. D., and the contingencies taking place. So, also, in another case, (*p*) one bequeathed all his personal estate, to his wife, F., and appointed her sole executrix, but in case

(*n*) *Per Lord Brougham*, 2 Russ. 308.

& My. 408.

(*p*) *Bigge v. Bensley*, 1 Bro. C. C.

(*o*) *Beauclerk v. Dormer*, 2 Atk. 190.

of the death of F. without issue, *then*, he gave the whole, to the eldest son of his brother, R. Lord *Thurlow* held, that the word, “*then*,” in limitations of estates, was merely a word of relation, and not an adverb of time, and upon Lord *Hardwicke*’s authority, he said, he must hold, that that word did not make any difference. And, again, in a more recent case, (*q*) where there was a gift in the following words:—“In case of her death without lawful issue, I *then* will the money so left to her, to be equally divided betwixt my nephews and nieces who may be living at the time;” it was decided by Lord *Brougham*, C., that, “*then*,” was a word of reference, relating to the determination of the first limitation, whether at or whensoever after the death, the issue should fail. And, moreover, in a still later case, (*r*) there was a bequest of a moiety of the testatrix’s residuary estate, to her natural daughter, E. B. O., for life, to her separate use, and upon her decease, to her children lawfully begotten, and in case of her decease without lawful issue, *then*, to J. O., also a natural child of the testatrix. E. B. O. had only one child, who died a few hours after its birth; and J. O. also died without issue. After the decease of E. B. O., a bill was filed, by persons who had taken out letters of administration to the deceased child, claiming to be entitled to a sum of stock, part of the testatrix’s personal estate. The fund was claimed by the Crown, on the ground, that there was a valid executory gift to J. O., in case of the decease of the legatee for life without leaving issue surviving her, to the benefit of which, the Crown was entitled, by reason of the death of J. O. without issue. The question, therefore, obviously, was, whether the word, “*then*,” was sufficient to restrict the failure of issue, to the time of the death of the first legatee, as it was only upon the force of that word, that such a construction could rest. Sir *J. L. Knight Bruce*, V. C., after

(*q*) *Campbell v. Harding*, 2 Russ. & My. 390.

(*r*) *Pye v. Linwood*, reported in 6 Jur. 618.

quoting and commenting upon, at length, the arguments of Lord *Brougham*, in the last-cited case, decided, that, "then," did not mean the instant of death of the parent, but death without issue, generally, and that, therefore, the representatives of the deceased child were entitled.

"Immediately thereupon" also of no force.

Upon the like ground, there can be little doubt, that the words, "immediately thereupon," or the like, would be inoperative, to give rise to a restricted interpretation of the contingency of a failure of issue.

15. "If any" in limitation to issue, preceding gift-over, not sufficient to support restrictive construction.

15. And so, again, words, which, though apparently confining the failure of issue, to the time of the death of the first taker, do, in fact, express no more, than *is*, from the nature of the case, implied, will have no restrictive effect, in accordance with the rule, *expressio eorum quæ tacite insunt nihil operatur*. If, therefore, there be a limitation of personalty, to A., and the heirs of his body, *if any*, and in default of such issue, over, it may, perhaps, at first sight, appear, that the words, "if any," must be construed, if there shall be any issue at the time of the cesser of the life-estate, and that the further limitation, in default of issue, must be confined to the contingency of a failure of issue, at that particular time. But the following observations of Sir *W. Grant*, M. R., in reference to a bequest of the kind mentioned, entirely dispose of any such argument (*s*):—"Can the addition of the words, 'if any,' which must always be implied, whether they are added or not, change the sense of, 'heirs of the body,' and make those words mean, such heirs of his body only as should be living at his (the first taker's) death? To be sure, if there were no heirs of his body, none could take: but a limitation-over, in default of heirs of the body, includes both the case, of there never being any heir, or, of there being none capable of taking, by surviving the parent, and of the failure of such heirs, at any subsequent time. Though heirs of the body, if any, are to take, which is the

Case of *Elton v. Eason*.

(*s*) See *Elton v. Eason*, 19 Ves. 78.

whole import of the clause, how does it follow, that the remainder-man-over is not to take, whenever the heirs shall fail, at whatever period that may happen? Supposing, personal property were capable of being entailed, I see nothing, that would shut out the claim of the remainder-man, whenever a failure of issue should have taken place. It would be no answer to him, to say, the heirs, if any, were to take before you. That, every limitation to heirs of the body implies: they are to take before the remainder-man: but is he not to take when they fail?" And, in the case, upon which these observations were made, accordingly, the learned judge held, that the absolute interest in the personal property bequeathed, vested in the first taker, and that the legatee-over, who claimed on his death without issue, had no title.

We have thus ascertained, the various distinctions that prevail, in regard to the expressions and circumstances, which are of weight, to give a restricted interpretation to words, importing, in the first instance, an indefinite failure of issue, in limitations of terms and other personal estate. One general observation, to be made with respect to them, is, that, however plain the expressions, or intelligible the circumstances, to which this restrictive force is attached, they are only allowed effect, as affording *evidence* of the *intention* of the author of the gift; and that presumption may, therefore, be always rebutted, by any thing in the language of the limitations, denoting, that the words, referring to a failure of issue, were used in the general unconfined sense, which belongs to them, according to their proper legal signification. And, of course, in estimating, in any given case, the relative weight of legal import, and of ambiguously expressed intention, the primary interpretation of words or expressions must be considered to be, that which is sanctioned by the former, to be repelled, only by the plain expression, or necessary implication, of a contrary intent, in the author of the limitations: in other words, the *presumption* must be treated, as on the side of *law*, and the *burthen*

General observations as to subject of this Subdivision.

of *proof*, on that of *intent*. For while, upon the one hand, the construction of specific words, which have acquired a fixed legal import, (so as to enable the learned to decide immediately, how far, and, in what manner, property may be dealt with and settled,) must not be broken in upon; so, on the other, it is perfectly allowable, to push criticisms, to the utmost extent, upon those words, where the liberality of modern times has struggled, to escape from the trammels of technical conclusions, which obstruct or stand in the way of evident intention, by admitting minute, yet obvious distinctions, deduced from additional language, or concomitant circumstances. (†)

As to applicability of above rules and distinctions to limitations in deeds.

It remains, to observe, that all the authorities, as to the restrictive force of particular expressions and circumstances, upon the contingency of a dying without issue, in respect to limitations of personality, are confined to instances of such limitations, in *wills*; and, as was remarked, when concluding a similar inquiry as to limitations of real estate, (u) it is impossible, to predicate, with any degree of certainty, to what extent, the rules, that have been established, in reference to testamentary dispositions, would be extended to cases arising upon instruments *inter vivos*.

SUBDIVISION II.

Of the exceptions to the rule, invalidating limitations of personality, to take effect on an indefinite failure of issue.

It will be proper, now to proceed to inquire, in what instances, limitations of terms or other chattels, expressed to take effect upon a general failure of issue, are valid.

No exception,

In the first place, it is plain, that there is no opening for an exception to the general rule, analogous to that founded

(†) *Powell's note to F. Ex. Dev.*
257.

(u) *Vide supra*, pp. 251, 252.

on the devise of a reversion of real estate, expectant upon failure of the issue entitled under a preceding entail; (v) and *that*, because the existence of an interest in personal property, contingent upon an indefinite failure of issue, is impossible.

analogous to that of devise of reversion on estate-tail.

For a similar reason, it is manifest, that the exception, in the case of realty, of possibilities, depending on base-fees arising by matter *ex post facto*, (w) can have no place, in regard to limitations of personalty on failure of issue. That doctrine necessarily pre-supposes the existence of valid estates, posterior to or expectant upon a preceding estate-tail, which, nor analogous interests, cannot co-exist in personalty.

And none, similar to that of interest expectant on indestructible base-fee.

1. The exception to the rule in question, arising in the limited extent of the subject-matter, which has been formerly noticed, (x) in reference to gifts of real estate, is of equal applicability to limitations on a failure of issue, where the subject-matter is a term of years determinable on lives, or is, otherwise, such, as to afford a guarantee for the non-violation of the laws against remoteness. But it will be well, to delay the more particular consideration of this subject, agreeably to the course adopted, in reference to the same question, as connected with limitations of real estate.

1. Exception, when subject is a term determinable on lives.

2. The most frequently-occurring instance, of a valid limitation of personal property after a general failure of issue, is that which is technically termed, a *limitation with a double aspect*. (y) Thus, let it be supposed, that a term is bequeathed, or limited by deed, to A., for life, and, after his decease, to his first (unborn) son, and the heirs of his body, with a limitation-over, on failure of such issue, to B. Here, it is plain, that the limitation to B. must be void, if the event, on which it depends, be regarded, abstractedly; because there is a prior limitation to the son of A., and his issue, and it is only upon his death, and the general failure of

2. Limitations of chattels with a double aspect.

(v) *Vide supra*, p. 253.

My. 406.

(w) *Vide supra*, p. 267.

(y) See 2 Rep. Leg. 395; 2 Jarm.

(x) *Vide supra*, p. 267. See remarks of Lord Brougham, 2 Russ. &

Pow. Dev. 640.

his issue, that the subsequent limitation is to take effect. But, inasmuch as no son of A. may ever be born, and the gift, therefore, to that son may never vest, the law regards all the limitations, subsequent to that in favor of A., as being in suspense, until the birth of a son to him : if such a son be born, the whole interest in the term vests absolutely in him, under the gift to him and the heirs of his body, and the subsequent limitation to B. instantly becomes void: if, however, A. die without having had issue, a son, and so, the limitation to that son fail of taking effect, the ulterior gift to B., thereupon, becomes good in event, and the whole term vests absolutely in him. And, moreover, as it must be decided by the death of A., whether he has any son, or not, and it is, upon the failure of such issue only, that the limitation to B. can vest, all tendency to a perpetuity, in respect of it, is removed; for, however remote it may be, as a contingent limitation, yet, it is impossible, that it can ever vest, at any later period, than the death of A.

And this reasoning equally applies to *any number of successive* contingent limitations: until the first executory limitation of the whole interest vests, any of the succeeding limitations, although, apparently, depending upon the general failure of issue of the person, to whom the first limitation is made, may eventually be good; each, of course, taking place, according to its order: and, if the executory limitation, which takes place upon the failure of the first gift, carry the whole interest, then, all the subsequent limitations become void; if it do *not* include the entire interest, the gifts expectant upon it will take place, in due course, until some one, embracing the whole interest, happens to vest.

Exemplification of this doctrine.

To exemplify this, by the common mode of limitations in marriage settlements:—A term of years is assigned to trustees, in trust for the husband and wife, successively, for their respective lives, and, after the decease of the survivor, in trust for the first, second, and every other son of the marriage, successively, and the heirs of their respective

bodies; with further limitations, in case of there being no sons of the marriage; and a proviso is then inserted, that the term shall not vest absolutely in any son, under the limitation to him and the heirs of his body, until he shall attain the age of twenty-one years. It may be supposed, two sons are born: until the attainment, by the eldest, of his age of twenty-one years, it is uncertain, whether he will ever acquire a vested interest, under the limitation to him. If the eldest son attain his age of twenty-one years, the whole term vests absolutely, by virtue of the limitation to him and the heirs of his body, and the gift to the second son immediately becomes void: if the eldest son die in his minority, the limitations, subsequent to that in favor of the deceased son, continue in suspense, until the second son attains his majority, whereupon, the whole interest in the term vests absolutely in him: and the same applies to each son successively becoming an eldest, until some one son attains a vested interest.

In fact, as it has been well said, (z) it appears, that in a settlement of chattels, there may be an interest, answering to a remainder, expectant upon a *contingent*, but not upon a *vested*, estate-tail. And this mode of settlement is called a limitation *with a double aspect*, because the limitations, subsequent to the first which carries the whole interest, do not properly take effect *after* that limitation, but as *alternatives substituted in its place*, if it fails, in consequence of no person acquiring a vested interest under it.

Reason for particular denomination of the doctrine.

As this doctrine is the foundation of, and is, therefore, exemplified in, nearly all modern settlements of terms of years and other chattels, it will be unnecessary, to illustrate or confirm it, by more than two decided cases. In one case, (a) a testatrix bequeathed a term of years, in trust (after payment of debts, &c.) for F., for life, and after his decease, for his first son, and the heirs male of his body,

Case of *Stanley v. Leigh*.

(z) Burt. Elem. Comp. 325.

(a) *Stanley v. Leigh*, 2 P. Wms. 686.

and in default of such issue, for the second and other sons of F., severally and respectively, in order and course, as they should be in seniority of age and priority of birth, and the several heirs male of the respective bodies of such son and sons, and in default of such issue, for the use of the daughter and daughters of F., and, if more than one, to be divided among them, share and share alike, at their ages of twenty-one, or their respective days of marriage, and in default of daughters, or in case of their death before twenty-one, or marriage, to P., for the then residue of the term; and F. died without having had any issue. Upon the question, whether the limitation of the trust of the term, to P., was a good or a void limitation, Sir *Joseph Jekyll*, M. R., after elaborately examining the several authorities upon the subject, and discussing their principles, decided in favor of the validity of the bequest to B., *as the limitations to the sons and daughters had never vested*.

Case of
Murray v.
Addenbrooke.

Again, in a more modern case, (b) a testator, having bequeathed a yearly sum, to a person, for life, gave the annuity, upon the death of the annuitant, to the eldest surviving son of A., and failing the issue male of A., to the daughters of A., living at the demise of such male issue; at the death of the annuitant, A. had no son living, but had two daughters: and it was held, that the gift to the daughters of A. was not too remote, and that they were, therefore, entitled to the annuity. Here, we perceive, that the ulterior limitation was a gift, in the alternative event of no person becoming entitled under the prior limitation, which, if it had taken effect, would have entirely superseded the former, because this would, in that case, be expectant upon too remote an event, *viz.*, the general failure of issue male of A.

To be valid,
limitation tak-
ing effect under

It must be observed, in conclusion of this subject, that, in order to a limitation of a chattel taking effect as a substi-

(b) *Murray v. Addenbrooke*, 4 Russ. 407.

tuted gift, under the rule we have been considering, it must be so limited, as to vest, (if at all,) within the period prescribed by the Rule against Perpetuities: if it be not so limited, although none of the prior interests may vest, it will, together with every subsequent limitation, be void, in the same manner, as if made to take effect, *after* or *upon* the preceding limitation, determinable upon a general failure of issue. And, of course, it is necessary, that the preceding limitation, on failure of which, a subsequent one is substituted, should not be too remote in its creation, because, as the latter is to take effect, at the time limited for the first, (if at all,) and not before, it must be tainted by any objection of remoteness, to which that may be exposed.

this rule must be such as to vest within limits of perpetuity.

3. Another and the last instance, of a limitation of personal estate upon a general failure of issue being valid, occurs, where there is a bequest to a person, and in the event of his death without issue, over, to another, and the first legatee dies without issue, *in the lifetime of the testator*.

3. Bequest on failure of issue of a person, and death of that person without issue, in testator's lifetime.

Such, at least, would appear to be the doctrine established by a recent case, (c) in which, there was a bequest of chattels, to two legatees, share and share alike, and upon the death of either of them without lawful issue, her share to go to the other; and it was held, that the death of one of the legatees without issue, in the testator's lifetime, entitled the surviving legatee to the property bequeathed, under the gift-over. The argument for the surviving legatee was, that the will, speaking not from its date, but from the death of the testator, the gift-over would, after the death of one of the legatees without issue, take effect; and that, by which his claim was opposed, was, that the gift-over was void, as it was to take effect, upon an indefinite failure of issue, and that, if the gift-over were void, in the first instance, the circumstance, of the death of one of the legatees, in the testator's lifetime, would not cure its original invalidity. As the

(c) *Mackinnon v. Peach*, 3 Keen, 555.

Master of the Rolls could not have decided in favor of the surviving legatee, upon the ground, that the gift-over to her had the effect, of restricting the failure of issue referred to, to the death of the legatee, (the word used in the gift-over being, merely, "other,") it must be supposed, that the coincided in the argument, by which the claim of the successful party was supported. This conjecture is offered, only because it cannot be collected from his lordship's judgment, as reported, upon what precise ground, he gave effect to a limitation, *prima facie*, and according to ordinary rules, too remote.

Same rule
applies to
devises
governed by
1 Vict. c. 26.

It may be observed, in reference to this doctrine, that, as it depends upon the operation of the will commencing at a period posterior to the happening of the failure of issue, *viz.*, at the death of the testator, it would seem to be equally applicable to devises of *real* estate, subsequent to the year, 1837, which, by the recent statute, 1 Vict., c. 26, are assimilated to bequests of personalty, in respect of the time of their taking effect.

It is, further, to be remarked, that this doctrine is not open to the objection of impugning the rule, formerly laid down, that, in deciding on the validity of testamentary limitations, regard cannot be had to subsequent events; for that rule assumes, that the gift, whose remoteness is in question, becomes capable of *taking effect*, so far as the actual existence of valid objects is concerned, and declares the gift void, simply because it did not, in its inception, contemplate such objects *only*; whereas, in the case supposed, the contingency, which would render the limitation void, as of too remote expectancy, has happened previously to the period, when the operation of the instrument commences,—is, in fact, an *ascertained event*.

SUBDIVISION 3.

Limitations of personalty on a dying without issue occurring subsequently to gifts to children or other issue.

Following the order observed in our inquiries respecting limitations of real estate, dependent on a failure of issue, (d) we are now to consider, the mode and effect of the application of the *referential construction*, where the subject-matter of the gifts is personalty.

The doctrine in question, it will be remembered, (e) has reference to those cases, where the gift-over, though, in terms, made to depend upon the general failure of issue of a person, is construed, as intended to take effect upon the failure of a *particular description of descendants*, to whom express limitations have been before made, and who must take within a certain allowable period, or not at all. Here, if it be clearly the intention, to make provision only for certain members of a class, answering a particular description, the generality of the expression, which refers to the failure of the *whole* class, is confined by the prior provisions. If, for example, there be a bequest, to A., for life, and after his decease, to all his children, and in default of issue of A., to B.: regarding the words introducing the limitation to B., abstractedly from the prior gift to A.'s children, the former is, clearly, too remote; but connecting the term, "issue," with the previous limitation, it is then restricted, so as to denote the issue before mentioned, *viz.*, children of A. In other words, the generality of the expression, "in default of issue," is restricted to mean, a failure of the class of issue included in the prior gift, by reading the limitation-over, as if it stood thus,—“in default of *such* issue,” or, “in default of *the said* issue,” &c.

Nature and operation of referential construction.

Thus, where (f) a testatrix, by her will, limited certain

Case of *Morse*

(d) *Vide supra*, p. 277.

(f) *Morse v. Marquis of Ormonde*,

(e) *Vide supra*, p. 277, *et seq.*

5 Madd. 99.

v Marquis of
Ormonde.

estates, to her daughter, Lady O., for life, remainder, to her *first and other sons*, successively in *tail-male*, remainder, to her daughters, as tenants in common in *tail-general*, and if an only surviving daughter, to her in *tail-general*, and in default of *all such issue* of Lady O., to trustees, for one thousand years, upon trust, to raise the legacies the testatrix had thereafter bequeathed, or should bequeath by any codicil or codicils; and the testatrix afterwards bequeathed certain legacies, *from and immediately after the decease and failure of issue* of her daughter, Lady O.; Lady O. having died without issue, the question was, whether the legacies bequeathed, as above mentioned, were valid, or too remote and void. Sir John Leach, V. C., said, it was perfectly true, that there was no estate before limited to the issue female of sons of the daughter, and, consequently, no estate, which extended to all possible issue of the daughter, and that, taking the expression literally, the legacies were too remote: that the literal force of the expressions was not according to the real intention of the testatrix, admitted of no doubt; and the question was, whether, upon the whole of the will, there was sufficient evidence of intention, to warrant the Court in holding, that, when the testatrix used the expression, 'from and after the failure of issue of my said daughter,' she must have meant, 'issue of my said daughter *as aforesaid*;' and that the testatrix, having, upon failure of particular issue of her daughter, created a term, for the sole purpose of paying legacies, and having used expressions, which imported, that those legacies were to be paid when the term arose, when she afterwards spoke of the legacies, which were to be paid upon failure of issue of her daughter, must be understood, as speaking of those legacies, for which she had before provided, and which were to be payable, upon failure of particular issue of her daughter; and the two clauses were to be rendered consistent, by supplying the sense of *issue aforesaid*.

Again, where (g) a testator bequeathed the residue of his personal estate, to trustees, in trust for his daughter, and after her decease, for all and every the child or children of his daughter, share and share alike, when they should respectively attain twenty-one; and in case any of the said children should die under twenty-one, and have one or more child or children, *which should survive the testator's daughter*, and live to attain twenty-one, such child or children to be entitled to his or their parent's share; provided, that, in case any child or children of his daughter should die before attaining twenty-one, the share or shares of such child or children to go to the survivor or survivors, and the *issue of any deceased child or children*, who should marry and die under twenty-one, to be equally divided between them, if more than one; the issue of any deceased child or children to stand in the place of their parents; and if there should be no child of the testator's daughter, or, there being any such, none of them should live to attain twenty-one, *nor leave any issue who should live to attain that age*, then, over: the question was, whether the limitation-over, in the event of the testator's daughter having no child, who should live to attain the age of twenty-one, nor leave any issue which would live to attain that age, was, or was not, too remote. Sir *John Leach* said, that the first provision in the will, in favor of the children of a child of a daughter, who should die under twenty-one, was confined to *such grandchildren as should survive the daughter*, and, if, in the subsequent passages of the will, the testator was to be understood to speak of such grandchildren *only*, the limitation-over was plainly not too remote: that it was reasonable to intend, that the testator meant, that the same grandchildren who, by the former clause, were to take their parent's original share, should take that portion of the share, which accrued by the death of another child of the daughter, with-

Case of *Trickey*
v. *Trickey*.

out leaving issue, and which their deceased parent, if living, would have taken ; *viz.*, *the grandchildren only who should survive the daughter* : and that, if the prior gifts were only in favor of the grandchildren who should survive the daughter, the gift-over must be intended to take effect, *upon failure of the former gifts*, and was, consequently, to take effect, upon the failure of grandchildren *who should survive the daughter*, and not live to attain twenty-one, and was, therefore, plainly, not too remote.

Case of
Ellicombe v.
Gompertz.

In another case, (*h*) there was a bequest of a residue, upon trust for the testator's grandson, B., the son of *Isaac*, at twenty-five, for life ; and, after the death of B., in case he should have a son, who should attain twenty-one, then, for such son of B., who should first attain twenty-one, absolutely ; and in default of such son of B., and after B.'s death, then, upon trust for the testator's grandson, J., the son of *Isaac*, at twenty-five, for life ; and, after the death of J., in case he should have a son, who should attain twenty-one, then, to such son of J., who should first attain twenty-one, absolutely ; with the like limitations, successively, in favor of any other grandsons, sons of *Isaac*, born in the testator's lifetime, and their respective sons, first attaining twenty-one ; and, in default of a son of any such grandson attaining twenty-one, then, upon trust for any son of *Isaac*, born after the testator's decease, who should first attain twenty-one, absolutely ; and in case no son of any son of the testator's son, *Isaac*, then born or thereafter to be born, in the testator's lifetime, nor any son of his son, *Isaac*, born after his decease, should attain twenty-one, then, *from and immediately after the decease of all the sons and grandsons of his son, Isaac*, upon trust for the testator's nephew, G., for life ; and, upon the decease of his nephew, G., in case he should have a son who should live to the age of twenty-one, then, upon trust for such son, who should first attain

(*h*). *Ellicombe v. Gompertz*, 3 My. & Cr. 127.

twenty-one, absolutely. The son, *Isaac*, had three sons, all born in the testator's lifetime, who died without having had any male issue; and, upon the death of the survivor of the grandsons, the question arose, whether the limitation-over, in favor of the first son of G., who should attain the age of twenty-one years, (G. himself having died,) after the limitations to the sons and grandsons of the testator's son, was valid; it being argued, that that limitation was void, because it was made to depend, in terms, upon the deaths of all the grandsons of *Isaac*, including the male issue of his sons, as well born as to be born, that is, upon the failure of lives, which had not, or might not have, come *into esse*, at the time of the testator's decease. Lord *Cottenham*, C., said, that, undoubtedly, if the words introducing the gift-over were to be construed literally, it would be too remote: that the result of all the authorities was, that, in such cases as that before him, if it was necessary to put a restricted sense, upon the words used in the gift-over, in order to effectuate the intentions of the testator, as evidenced by other parts of the will, it was competent for the Court to do so: and, being satisfied, that the intention of the testator was, that the gift-over should take effect, upon the failure of the persons particularly described as the objects of his prior gifts, his lordship was of opinion, that he must hold, the son of G. to be entitled.

Again, in a still more recent case, (i) (to mention but one more,) a testator gave the income of his personal, and the rents of his real, estate, to his daughter, for life, for her separate use, and after her decease, and the decease of his wife, he gave the residue of his real and personal estate, to trustees, in trust to sell, and pay half the produce, "to the issue" of his daughter, equally, to be paid at twenty-one;

Case of *Carter*
v. *Bentall*.

(i) *Carter v. Bentall*, 2 Heav. 551. *Blackburn v. Edgeley*, 1 P. Wms. 600, *Malcolm v. Tnylor*, 2 Russ. & My. 416.
And see also *Ginger d. White v. White*, Willes, 348; *Goodright d. Docking v. Dunham*, Dougl. 264;

"and if only one *child*, then to such one *child*"; and he directed the trustees, to apply the interest, in the maintenance and education of such issue; and, "in default of *such* issue," he gave such moiety of the residue, between his nephews and nieces living at the death of his daughter. Upon the question, whether the gift-over of the first moiety, upon the death of the daughter without issue, was void for remoteness; Lord *Langdale*, M. R., held, that the word, "issue," was to be construed, "children," and that, consequently, the gift-over was good. In this latter case, the rule under consideration received a more striking exemplification, inasmuch as a bequest-over of the other moiety of the estate, upon the death of the testator's daughter without issue, was held void, there being no prior limitation to a particular class of such issue, to which the term might be confined, and which might qualify its general meaning.

But referential construction does not obtain, if an apparent intention, that gift-over should not take effect, till failure of all the issue of first taker.

But the rule, which explains and defines the extent of the term, "issue," by the mode in which it has been previously used, does not apply to those cases, where it seems necessary, to give to that word, its full ordinary meaning, in order to effectuate the apparent intention, and to let in children or other issue, to exclude whom there does not appear to be any intention, but with respect to whom, it simply appears, that they are not comprised in the former description or enumeration. (j) In such cases, therefore, the gift-over will not be assisted by the circumstance, of there being a previous limitation to a descript class of descendants, to whom the words, "die without issue," or the like, may be made to refer; and will, consequently, be void, as too remote.

If this construction rebutted, first taker has absolute interest, expectant on

And, on the other hand, for the *professed* purpose of letting in such of the issue, as have not been before expressly provided for, the words, referring to the failure of issue of the tenant for life, will have the effect, of giving him the absolute

(j) *Franks v. Price*, 3 Beav. 182. 3 My. & Cr. 152, 153.
Judgment in *Ellicombe v. Gompertz*,

interest, in the event of the failure of the preceding limitations, in accordance with the general rule of analogy to those cases, in which, an estate-tail is raised by implication, under similar limitations of realty. (*k*) It is to be observed, however, this construction is adopted, rather as a necessary consequence of the fixed legal import of certain words, than, as a means of effecting the supposed intention of the author of the gift, to provide for all the issue, on whose failure, the ulterior limitation is to take effect. If the words, "die without issue," are not referred to a class of issue, previously described, they, necessarily, contemplate the general failure of issue of the tenant for life, (for we are supposing the ordinary case of a limitation-over on failure of *his* issue,) and as, in that case, the effect, as regards real estate, would be, the implication of an estate-tail in him, the rule of analogy, before referred to, gives him the absolute interest in personalty. If, on the other hand, the words in question are understood to mean, issue of a particular description only, then, there is not only no enlargement of the interest of the tenant for life, but the result ensues, of the validity of the ulterior gift.

preceding limitations, by analogy to the rule in case of realty.

When, however, the preceding gifts exhaust the whole issue of the tenant for life, (and, therefore, as a necessary consequence, all the issue, on failure of whom, the gift-over is to take effect,) no enlargement of his interest will be implied from words, in which the gift-over is expressed. (*l*)

When preceding limitation embraces all issue of first taker, no enlargement of his interest, by force of gift-over.

As the consequence of not holding the limitation-over, in the case of personalty, to be strictly referential to the objects of the preceding gift, is, the invalidity of that limitation, on the ground of remoteness, the inclination of the Courts is much more favorable to the referential construction, when the subject-matter is personal estate, than when it is realty; a gift-over of which, on failure of issue, is supportable by the implication of an estate-tail in the ancestor, if it is not

Inclination of the Courts favorable to referential construction, when subject-matter is personalty.

(*k*) *Franks v. Price*, *ubi supra*.

supra. And see, in *arguendo*, *Attorney-General v. Sutton*, 1 P. Wms. 760.

(*l*) Judgment in *Franks v. Price*,

supra.

capable of being construed, as referring solely, to issue or children previously described. As, moreover, the interest, which is raised in the ancestor by implication, when the failure of issue is held to be indefinite, does not, of itself and in its own nature, carry the property to the issue who are excluded from the prior gift, and to provide for whom an intention is presumed, the very ground, on which the application of the referential construction is frequently refused, in the case of real estate, fails, when the question is to be considered, in reference to a limitation of personalty.

Perhaps, therefore, it will be found, that there are very few instances, of a limitation-over of personal estate, on a dying without issue, having been held, to contemplate an indefinite failure of issue, when preceded by a gift to issue or children, or a class of either, other than those cases, where realty and personalty have been combined in one general disposition, and the Courts have felt themselves obliged, to apply the same rule of construction to the entire gift, and have, therefore, determined, that the ancestor took the absolute interest, by force of the limitation-over, after a failure of the objects of the preceding gift.

E. G.: the rule applied, in case of a gift to eldest son of first taker, and limitation-over, on failure of issue of the latter ;

Thus, it was formerly observed, (*m*) that where a limitation of real estate, is made to an *eldest son* only, with a subsequent gift-over, on failure of issue of the parent, an estate-tail is raised in the latter, expectant on the estate limited to the eldest son ; thereby negating the referential construction. Where the subject-matter of the gifts, however, is personalty, it seems to be settled, (*n*) that the limitation-over is to be construed, as simply dependent on the failure of the object of the preceding gift. It is clear, moreover, that the same rule will hold, although the limitation to the son be, in terms which will create an estate-tail in realty, inasmuch

(*m*) *Vide supra*, pp. 284, 285.

(*n*) *Pleydell v. Pleydell*, 1 P. Wms. 748, explained and corrected, Ambler 125. *Marsh v. Marsh*, 1 Bro. C. C.

293. *Keating v. Keating*, L.L. & Go. temp. Plunkett, 201. And see *Murray v. Addenbrooke*, 4 Russ. 407.

as the principle of the referential construction is equally applicable; *viz.*, that the limitation-over is dependent on the event of no son coming *in esse*, and not, upon that of an indefinite failure of issue of such son. (*o*)

So, again, it seems to be clear, (*p*) that the circumstance, of the interests of the issue taking under the preceding gift being dependent, for their vesting, upon the *attainment of a particular age* by such issue, is not sufficient, to rebut the construction, rendering the contingency contemplated by the limitation-over, referential to the objects of a prior gift; although (as was formerly seen, (*q*)) the application of that construction has been denied to similar limitations of *reality*.

It seems to follow, from the rule established, in regard to a gift of personal estate to an eldest son, with a subsequent limitation-over, on failure of issue of the parent, that the doctrine of referential construction will, also, be applied, in the case of a gift of personalty, to a *definite number* of children, with a subsequent limitation, on the death of the parent without issue; and it should appear to be of little importance, in reference to this point, whether the limitation be to the children, concurrently, or, successively.

Although there is but little authority, applicable to the case of a gift of personalty to issue, or children, *for life*, expressly, with a subsequent limitation-over, on failure of issue of the parent or ancestor, it seems to be clear, that the rule of construction under consideration cannot be extended to limitations of that character; (*r*) for the obvious intention, to make the ulterior gift dependent on failure of the issue of the first taker, cannot, possibly, be satisfied, by construing it, to be referential to a class of issue, whose extinction im-

—and also in case of gift-over on failure of issue, when vesting of interests of the issue contingent on their attaining a certain age;

—also, (*semble*) when preceding gift to *definite number* of children.

Rule will not be applied, when gift to issue, *for life* only.

(*o*) *Sed vide*, *Monkhouse v. Monkhouse*, 3 Sim. 119. See, however, the observations of Mr. Prior, on that case; *Treatise on "Issue,"* 176.

(*p*) *Pleydell v. Pleydell*, *ubi supra*.

M^cDonald v. Bryce, 2 Keen, 276.

(*q*) *Vide supra*, p. 286.

(*r*) See *Murthwaite v. Jenkinson*, 2 B. & C. 358.

plies, not even a failure of *partial* issue, but, simply, that certain limited interests to a particular generation of issue fail of taking effect. (s) In such case, therefore, it should seem, the ancestor would take an absolute interest, expectant on the gifts for life to his children, and that, therefore, the limitation-over would be void for remoteness. (t)

Wherever doctrine applicable, in case of realty, it will hold, in respect to similar limitations of personalty.

It is almost needless, to remark, that wherever the rule in question would obtain, if the subject-matter of the gifts were real estate, it will be of equal applicability, in regard to similar limitations of personalty; the tendency of the judicature being rather favorable, than otherwise, to the *extension* of the doctrine, in the latter case, beyond the limits, to which it has been confined, in the former.

Rule assumes, that issue takes by purchase under preceding gift.

It will be observed, that the rule of construction under consideration proceeds on the assumption, that the preceding limitation to the issue operates to vest in them, interests *by purchase*; for if the effect of that gift be, merely to enlarge the first life-interest into an absolute limitation, the failure of issue intended must, obviously, be indefinite, and the gift-over is necessarily void, as too remote. (u)

Connexion of the question, whether issue take as purchasers, with the present inquiry.

This consideration will show, that it is a matter of importance, in cases *where there is an express gift to the issue*, after a prior limitation to the parent, to decide, whether the issue take by purchase, (*i. e.*, independently, and in their own right,) or, whether the word, "issue," be merely a word

(s) See Prior on "Issue," 147.

(t) *Sed vide*, *Murthwaite v. Jenkinson*, *supra*, where it was held, that the first taker had the absolute interest *immediately*, without reference to the limitation to the children for life.

(u) The learned reader will observe, that it is necessary to pursue a course, in reference to the consideration of gifts of personalty, different from that, adopted in the inquiry upon limitations of real estate, as to the question, under what limitations the issue take as purchasers. In the

case of real estate, the consequence of rejecting the referential construction is not the *remoteness* of the ulterior gift, because, generally speaking, it is supported by the implication of an estate-tail in the ancestor; but, as regards personalty, it is absolutely necessary, that the referential construction should obtain, and, therefore, that the issue should take as purchasers, in order to support the limitation-over, when expressed to take effect on an indefinite failure of issue.

of limitation, and, so, have the effect of enlarging the life-interest previously limited. (v) Fully to comprehend the nature of this question, it must be remembered, that in cases, where, (supposing the subject of the gift to be real estate,) by the *Rule in Shelley's case*, the estate for life in the ancestor would be enlarged into an estate-tail, there, a similar gift of personalty operates to vest the absolute interest of the term or other chattel, in the person, who would be tenant in-tail, in the former case: except that, as the doctrine of the union of the particular-estate for life with the remainder, and consequent enlargement of the former estate, in dispositions of realty, is founded only on a general rule of law, established upon feodal principles, (which contemplated only real estate,) the Courts will, in putting an interpretation on limitations of personalty, endeavour to construe, "issue," as a *descriptio personarum*, merely, where a plain intention appears, to confine the first taker to a life-interest. In all cases, therefore, as before observed, where the absolute interest in the legacy vests in the first taker, by reason of the word, "issue," being regarded as a word of limitation, it follows, as a necessary consequence, that the ulterior gift, to take effect on failure of issue of the first taker, will be void for remoteness, because it implies a *general* failure of such issue. But where, by means of an explanatory context, the limitation to the issue or heirs of the body of the first taker, is construed, as a designation of the person intended to take, on his death, by purchase, then, as the gift-over, on failure of issue of the first taker, will, under the rule we have been considering, be held to refer to the class of issue previously described, it will be

(v) "Words of purchase are those, by which, taken absolutely, without reference to or connexion with any other words, the estate first attaches, or is considered as commencing, in point of title, in the person described

by them; whilst words of limitation operate by reference to or in connexion with *other words*, and extend or modify the estate given by such other words." 1 Preston on Estates, 38.

good, as a limitation to take effect, in case of the death of the first taker without issue living at that time.

"Issue" and "heirs of the body," primarily, words of limitation.

Now, as an ordinary rule, it may be laid down, that the words, "issue," and, "heirs of the body," (which are *generally* and *primarily* regarded as synonymous, though the latter expression is more strict and technical,) are words of limitation, *i. e.*, do not carry the legacy to the persons answering that description, *as purchasers*, after the decease of the ancestor taking a prior life-interest, but describe and regulate the *quantum* of interest to be taken by such ancestor. And this construction is not varied by the circumstance, of *words of division or distribution* being superadded to the gift to the issue; (*w*) nor will that of a *gift-over in default of issue* afford sufficient reason for construing the word, "issue," otherwise than as a word of limitation. (*x*)

In what cases, "issue" and "heirs of the body" read as words of purchase.

Forwood, Robinson v. Richards & Alexander
21 L. J. R. 287 C. P.

This interpretation, however, assumes, that the instrument does not afford sufficient ground for a different construction; for all general rules of construction must give way to a contrary unambiguous intention, collected from the whole context of the deed or will. Thus, the superaddition of words of limitation and representation, as, "heirs," or, "executors, administrators, and assigns," to the gift to the issue, has, in some cases, been held, to show an intention in the author of the gifts, inconsistent with the legatee for life taking the absolute interest, under the interpretation of the term, "issue," as a word of limitation. (*y*) But it seems, that these additional expressions will not enable, "issue," or, "heirs of the body," to operate as words of purchase, unless the words introducing the gift-over confirm the supposition, of the issue being intended to take in their own right, by referring

(*w*) See *Doe v. Applin*, 4 T.R. 82; *Doe v. Cooper*, 1 East, 229; *Tate v. Clarke*, 1 Beav. 100; which, although decided upon limitations of real estate, seem authorities, no less applicable to gifts of personalty. *See vide*, 2 Jarm. Pow. Dev. 638, 639.

(*x*) *Doe v. Featherstone*, 1 B. & Ald. 944. *Tate v. Clarke*, *ubi supra*.

(*y*) *Lodding v. Kime*, 1 Salk. 224. *Donne v. Merrifield*, cited Ca. temp. Talb. 56. *Hodgson v. Bussey*, 2 Atk. 89.

to them as "*such* issue." For if the limitation-over refer to a default of issue *generally*, the gift to the issue or heirs of the body of the first taker will have its usual or technical effect, although there be words of representation appended to it. Thus, where (x) there was a devise of freeholds, and also a bequest of leaseholds, to A., for life, and after his decease, to the heirs of his body, "their heirs, executors, administrators, and assigns, for ever;" but in case A. should *die without issue*, over; it was held, that A. took an estate-tail in the freeholds, and the absolute property in the leaseholds. And it is to be observed, that wherever the superaddition of words of representation is denied the effect, of giving, "issue," the force of a word of purchase, their virtual rejection from the limitations is the alternative implied; (a) for, as applied to any other interest, than such as vests primarily in the issue, they are not only nugatory, but, even, absurd.

In what cases, "issue" and "heirs of the body" read as words of purchase.

So, also, the circumstance, of the gift-over being expressed to take effect, not only upon a "default of issue" of the first taker, but, also, upon a *failure of issue of such issue*, or upon the *issue dying under twenty-one*, has been held sufficient, to confine the, "issue," first mentioned, to the immediate generation, and, so, to give it the force of a word of purchase. (b)

So, again, where a testator has, in other parts of the same will, and in connexion with other dispositions, used the word, "issue," as synonymous with, "children," or, "sons and daughters," it has been interpreted to be a word of purchase; the context not manifesting any intention, to use the term in a sense, different from that which it had before been made to convey. (c)

(x) *Kinch v. Ward*, 2 Sim. & Stu. 409.

(a) 2 Sim. & Stu. 418.

(b) *Doe v. Burnall*, 6 T. R. 30. *Merest v. James*, 4 Moo. 327; 1 Brod. & Bing. 127. *Lees v. Mosley*, 1 You. & Coll. 589. In limitations of realty, it

has been held, (judgment in *Jesson v. Wright*, 2 Bligh, 58,) that the force of, *heirs of the body*, as words of limitation, will not be controlled by a gift-over, on the issue dying under the age of twenty-one.

(c) *Cursham v. Newland*, 2 Bing.

In what cases, "issue" and "heirs of the body" read as words of purchase.

Further, the word, "issue," will be a word of purchase, if the life-interest and the limitation to the issue are not of the same nature, *i. e.*, either, both legal, or, both equitable, as it is necessary, that there should be that identity of character, in order to the applicability of the *Rule in Shelley's case*, in limitations of real estates. It follows, therefore, that where a term or other chattel is limited *in trust for the separate use* of a married woman, for life, and the property is afterwards *directly* given to her issue, the issue will take as purchasers. (d) But if the personal estate be *directly* bequeathed to the *feme*, for her separate use, and not through the intervention of a trustee, the circumstance, of the life-interest being for the separate use of the legatee, will not prevent its coalescing with a subsequent limitation to her issue. (e)

Again, in the case of a personal fund, if the *interest* only be given to the first legatee, and afterwards the capital or *corpus* of the fund, be limited to the issue, it has been sometimes held, that they will take as purchasers: and where a bequest of this kind occurred, and there were no issue to take, the consequence of the construction in question had place; *viz.*, the affirmation of the title of the ulterior legatee. (f) Where, indeed, the limitation has been to the *heirs of the body* of the first taker, the circumstance, of the gift to the latter being of the *interest* only, was (as was above remarked,) held insufficient, to prevent the whole legacy vest-

N. S. 58; 2 Moo. & Sc. 105; 2 Beav. 145. The decision in this case has been referred to the ground stated in the text, although, as the reasons of the judges do not appear, (it being a case from Chancery,) it may be doubtful, upon what it is to be rested. It would not seem, that the circumstance, of there being "benefit of survivorship among the issue," would suffice to prevent, "issue," being a word of limitation, any more than

words of division or distribution allow it so to operate. See also *Ridgeway v. Munkettrick*, 1 Dr. & War. 84.

(d) *Sands v. Dixwell*, cited 2 Ves. sr. 652, 661. *Price v. Price*, cited 2 Ves. sr. 234.

(e) *Douglas v. Congreve*, 1 Beav. 59.

(f) *Knight v. Ellis*, 2 Bro. C. C. 570. Perhaps, however, the word, "such," in the gift-over, exercised some influence, in this case.

ing in him: (g) but that doctrine must be considered to rest upon the superior force of, "heirs of the body," as words of limitation, in comparison with that of the word, "issue." (h) And in reference to, "issue," also, it seems, that, unless the distinction, between interest and capital or *corpus*, be plainly marked, it will operate as a word of limitation. Thus, in a recent case, (i) where a testator gave the sum of 500*l.* stock, "to S. T., to receive the interest during her life, and then to her issue, but in case of her death without issue, the said sum of 500*l.* stock," to go over; Lord *Langdale*, M. R., held, that S. T. took the absolute interest in the sum of stock, and that the ulterior bequest, upon her death without issue, was void for remoteness.

But, in general, the interpretation of, "issue," as a word of limitation, will prevail, notwithstanding the testator has affixed to the previous gift for life, words, seemingly negating any enlargement of that interest, such as, "and no longer," or, "and not otherwise;" (j) nor will the circumstance, of the gift to the issue being expressed to take effect, "afterwards," or, "after the decease" of the first taker, suffice, to prevent the union of the two interests, and the consequent enlargement of that of the first taker. (k) And, in a recent case, (l) this construction of the whole legacy

In what cases, "issue" and "heirs of the body" read as words of purchase.

(g) *Butterfield v. Butterfield*, 1 Ves. sr. 133, 154. *Tothill v. Pitt*, 1 Madd. 488; S. C. sub nom. *Earl of Chatham v. Dawson Tothill*, 6 Bro. Parl. Ca. 450. *Glover v. Strothoff*, 2 Bro. C. C. 33.

(h) See Prior on "Issue," 173.

(i) *Attorney-General v. Bright*, 2 Keen, 57. And see 2 Jarm. Pow. Dev. 639.

(j) *Robinson v. Robinson*, 1 Burr. 38.

(k) *Theobridge v. Kilburne*, 2 Ves. sr. 233. *Kinch v. Ward*, 2 Sim. & Stu. 409. *Tate v. Clarke*, 1 Beav. 100. *Elton v. Eason*, 19 Ves. 73. *Tothill*

v. Pitt, 1 Madd. 488. *Sed vide*, *Peacock v. Spooner*, 2 Vern. 43; *Dafforne v. Goodman*, 2 Freem. 228, 231; *Worman v. Seaman*, Fin. Ch. Rep. 279; 2 Ch. Ca. 209; and *Clare v. Clare*, Ca. temp. Talb. 21. It seems clear, however, that, at the present day, these cases cannot be treated, as possessing any authority, so far as they may establish a different doctrine from that laid down in the text. See the observations of Sir Thomas Plumer, respecting them; 1 Madd. 483, 486, 487.

(l) *Tate v. Clarke*, *ubi supra*.

In what cases, "issue" and "heirs of the body" read as words of purchase.

vesting in the first taker, by force of a subsequent gift to his issue, united with that to himself, was adhered to, although he had died before the testator, and had left issue, who were, of consequence, deprived of all benefit of the limitations, either as representatives of their parent, or under the gift to them.

It may be observed, that if, "children," be the term used, much less explanatory context will suffice, to give it the force of a word of purchase, than is requisite, in regard to, "issue:" *e. g.*, words of *division or distribution* will generally be sufficient, to prevent its being construed as a word of limitation. (*m*) In the absence, however, of any expression or circumstance, showing, that, "children," was intended to operate as a word of purchase, it will be construed, as synonymous with, "issue," and, therefore, will have the effect, of vesting the absolute interest in the first taker. (*n*)

The preceding observations will show, (what, indeed, has been before hinted at,) that the mere circumstance, of the interest of the first taker being expressly confined to his life, will, in no case, be sufficient, of itself, to prevent, "issue," operating as a word of limitation: although it may generally be predicated, that, in such cases, the intent of the author of the gift is adverse to any enlargement of that interest. Thus, Lord *Thurlow*, on occasion of this circumstance being urged in favor of such a construction, observed: (*o*)—"I think the argument immaterial, that he meant the first estate to be an estate for life. I take it, that in all cases, the testator does mean so; I rest it upon what he meant afterwards." Perhaps, however, some weight is due to this circumstance, when it is assisted by any expressions or other circumstances, pointing to an intention, to use, "issue," as a word of purchase; although (it may be) neither, taken

(*m*) *Doe v. Vaughan*, 5 B. & Ald. 464. *Doe v. Lyde*, 1 T. R. 593.

(*n*) *Gawler v. Cadby*, Jac. 346.

(*o*) In *Jones v. Morgan*, 1 Bro. C. C. 220; adopted by Lord *Langdale*, in *Douglas v. Congreve*, 1 Beav. 71.

separately, would be of sufficient importance, to authorize that construction. (p)

It seems, that where, instead of a term being limited for life, and afterwards, to the issue of the first taker, a *sub-term* is created out of it, determinable on the death of the person to whom it is limited, and, after his decease, to the heirs of his body, or issue, the issue will take by purchase. Thus, where (q) A., possessed of a term of 2000 years, demised to trustees, for 1700 years, if he and his wife, or any of their issue, should live so long, in trust for A., for 99 years, and afterwards, for the heirs of the body of A., on his wife; it was insisted, by the administratrix of A., after his decease, that the whole trust of the term of 1700 years, vested in the father, and was executed in him, and that the issue could not take by purchase: but, it was held, that, inasmuch as there was a term of 99 years, taken out of the 1700 years' term, and the father had a particular-estate unto him for 99 years, the trust of the whole term during the 1700 years, was not executed to the father, but that the limitation to the heirs of his body would carry it to all the children equally.

In what cases, "issue" and "heirs of the body" read as words of purchase.

And, so also, where a term, or other personal estate, is agreed to be settled by *marriage-articles*, upon a person, for life, and, after his decease, upon his issue by the intended marriage, it may be laid down, as a general rule, that a Court of Equity will execute the articles, by limiting the property, to the issue, as purchasers, by analogy to the rule, which is ordinarily observed, in regard to similar limitations of real estate, when the Court executes the articles, by directing limitations to the first and other sons of the marriage, successively in tail, with remainder, to the daughters, as tenants in common in tail. This rule proceeds upon the obvious purpose of the instrument; *viz.*, the securing a provision for the issue of the marriage, independent and free from the control of the parties contracting marriage. Indeed,

(p) See the observations of Sir 484.
Thomas Plumer, 1 Madd. 475, 483, (q) *Ward v. Bradley*, 2 Vern. 23.

In what cases, "issue" and "heirs of the body" read as words of purchase.

not only in the case of marriage-articles, but whenever the gifts are in the nature of *executory trusts*, and not complete in themselves, a Court of Equity will, in executing the limitations of the will or settlement, provide for the issue, by means of a limitation to them, as purchasers, unless an intention appears upon the face of the instrument, to vest the absolute interest in, and control over, the property, in the first taker. (r) But, in order to this interference, on the part of the Court, it will not suffice, that the limitations are, *by way of trust*; for that admits of their being *perfectly complete in themselves*; but it must appear, that the author of the gift contemplated some further settlement, as carrying out his intentions, and for which, the trusts declared by him, are intended, as general heads or instructions.

"Issue" has also been construed to be a word of purchase, where, after a limitation of a term, to A. and his issue, there was a gift-over, if A. should die and *leave* no issue: (s) Lord *Hardwicke* observing, in that case, that the words, "leave no issue," related to any child living at A.'s decease, and, therefore, showed, that such issue was to take, after A.'s death, and, consequently, that, "issue," was to be considered as a word of purchase. It may, perhaps, admit of a doubt, however, whether, at this day, "leave," would suffice to give, "issue," the force of a word of purchase, unless the distinction, between the prior life-interest and the gift to the issue, were clearly marked: and that was not the case with the limitations, in regard to which, Lord *Hardwicke* laid down the rule just stated; the gift, there, being, to F. and L., *and to their issue*, and if either of them should happen to die, and leave no issue, over.

It has been already hinted, that, in putting a construction upon, "issue," as a word of limitation, or a word of purchase, force has been attached to the circumstance, of the gift-over being, in default of *such* issue; as favoring the presumption,

(r) See *Rockfort v. Fitzmaurice*, 2 Dr. & War. 1.

(s) *Lampley v. Blower*, 3 Atk. 398.

And see the observations of Sir *Thomas Plumer*, in reference to that case, 1 Madd.

485; and 2 Jarm. Pow. Dev. 635.

that it was intended to take effect in default of *children*, who were to become entitled as *purchasers*. (i) Indeed, the true import of the word, "such," will be immediately manifest, if it be considered, that the alternative of the not holding it to amount to a sufficient indication of intention, that the issue were to take by purchase, is its virtual erasure from the wording of the limitations. It cannot, however, be, by any means, said, that the rule, which declares, "issue," and, "heirs of the body," to be, *prima facie*, words of limitation, will, in every case, yield to the presumption of a contrary intention, derivable from the expression, "*such issue*." For instance, where (u) there was a bequest, to A., during his life, and afterwards, to the heirs of his body, if any, and *in default of such issue*, over; it was held, that A. took the absolute interest in the personal property. Perhaps, therefore, the rule may be said to be, that where other circumstances aid the construction of the issue taking by purchase, as, for example, words of representation superadded to the gift to them, (v) the circumstance, of the limitation-over being, "in default of *such issue*," is sufficient, to incline the balance of legal interpretation, to that construction. (w)

In what case, "issue" and "heirs of the body" read as words of purchase.

Again, words, contemplating the contingency of the *non-existence* of issue, will be inoperative, to vest the property in

(i) *Kinch v. Ward*, 2 Sim. & Stu. 417. Clearly, however, as respects real estate, the word, "such," is of no force, to rebut the ordinary construction of, "issue," as a word of limitation, and the ancestor, therefore, still takes an estate-tail. See 2 Jarm. Wills, 342; Prior on "Issue," 162.

(u) *Elton v. Eason*, 19 Ves. 73. And see *Tobhill v. Pitt*, 1 Madd. 488.

(v) *Kinch v. Ward*, *ubi supra*.

(w) It may, at first sight, seem, that the character and extent of the first taker's interest are to be governed, by the words in the limitation to himself and his issue, only, and not by the terms of the gift-over; but the case ap-

pears to be embraced by the exception, made by Sir Thomas Plumer, in *Lyon v. Mitchell*, 1 Madd. 481, in favor of those instances, where the words of the limitation-over, "bear upon, and unite with, and tend to affect, the construction of the prior words, and which, in many cases, may enable us to come to a conclusion respecting it." This general principle seems adverse to the doctrine, advanced by Mr. Prior, (Treatise on "Issue," 145, 146,) that limitations, in which the gift-over is introduced by, "in default of issue," are to receive the same construction, as those, where the words, "in default of *such issue*," occur.

In what cases, "issue" and "heirs of the body" read as words of purchase.

them, as purchasers, if there are no other circumstances, concurring to assist that construction. Thus, in a case, recently cited, (x) where the limitation, to the heirs of the body of the legatee for life, was accompanied by the words, "if any," and followed by a gift-over on failure of such issue, the first taker was held to be entitled absolutely, and the gift-over, declared to be too remote.

Lastly, it is to be noted, that the circumstance, of the gift-over being *expressly* confined to take effect, upon a failure of issue *living at the death of the first taker*, will not prevent, "issue," being construed as a word of limitation, where the prior limitations, regarded irrespectively of the gift-over, require, or admit of, that construction. Thus, where (y) a testator bequeathed his residuary personal estate, to his four sons, share and share alike, as tenants in common, and *to the issue of their several and respective bodies* lawfully begotten, but, in case of the death of any or either of them, without issue lawfully begotten *living at the time of his or their death or respective deaths*, then, the part or share of him or them so dying, to go to the survivors and survivor, equally, share and share alike, and to the issue of their several and respective bodies lawfully begotten; it was argued, that, as in the Executory bequest-over, the words were, "dying without issue living at the time of the death," it was good, and had the effect of showing, that the word, "issue," was meant to be used as a *word of purchase*. But, Sir Thomas Plumer, V. C., thus forcibly combated the argument:—"Surely it is competent to a testator, to say, 'if my sons bear children, I mean, that they shall have an absolute interest, in all my personal property; but, if it ultimately turns out, that they leave no children at the time of their death, or, if any one of them should not, I give it over, in the way I propose.' If it could be shown, that the two propositions were incompatible,—

(x) *Elton v. Eason*, *ubi supra*.

(y) *Lyon v. Mitchell*, 1 Madd. 467.

that, to give an absolute interest, in one event, was incompatible with giving it over, in a contrary event,—then, undoubtedly, proving the second proposition would prove (z) the first; but, if the two propositions may stand together, *viz.*, that he should give it, absolutely, to the sons, in one event, and give it over, in another event, how does it at all advance the argument, or show, that, because, in the event of the sons leaving no children, he has given it over, that tells us, what is to be done, if the son has children?" And the learned judge, accordingly, decided, that the bequests to the four sons and their issue, passed absolute interests to the former, the share of each being defeasible, on his death without issue then living. Although, however, this last point is, in some measure, connected with our present subject, it is illustrative, only in a small degree, of the chief end of this inquiry, *viz.*, the application of the rule, which validates a limitation-over, expressed to take effect upon an *indefinite* failure of issue, by referring the word, "issue," to a particular description of issue, entitled, as purchasers, under a preceding gift.

In what cases, "issue" and "heirs of the body" read as words of purchase.

Thus, have we endeavoured, to ascertain the leading distinctions, which have obtained, in regard to the construction to be put upon, "issue," as, either, a word of limitation, or, a word of purchase, as the necessary sequel to our consideration of the rule, validating a limitation, to take effect upon a failure of issue, by referring the words, "die without issue," and the like, to a descript class of issue, entitled, under a preceding gift to them, as purchasers.

The principle of that rule is, in one respect, the same, with that of the rule, formerly considered, which ascertains

(z) Or, rather, would *disprove*: that is, upon the hypothesis assumed, (the incompatibility of the two propositions,) the proving, that, in the event of the first taker's death *without* leav-

ing issue surviving him, the property was to go over, would negative the supposed intention, to give the absolute interest, in the event of his death, *leaving* such issue.

the validity of limitations with a double aspect, inasmuch as the ulterior gift does not take place, as a limitation *after* or *upon* the preceding one, to the issue; but, in the alternative, only, of there being no such issue in existence, at the death of the first taker, or, of no such issue living to acquire a vested interest under the preceding gift to them. On the other hand, the consequence of the gift-over, on the failure of issue of the first taker, *not* being referrible to the class of issue, previously described, or, of, "issue," not operating as a word of purchase, is, that the limitation-over is void for remoteness, as being to arise upon an indefinite failure of issue.

Question of the application of the referential construction does not arise, when gift-over introduced by, "in default of such issue."

It need scarcely be observed, that, in the case of a bequest to a person, for life, and, after his decease, to his children, or other issue, as purchasers, and, in default of *such* issue, over to another, the ulterior gift is free from any objection, on the ground of remoteness; as, in such case, it is clear, that the gift-over is only to take effect, in the event of there being no issue, of the required description, at the death of the legatee for life. And, so also, if the vesting of the interests of the issue, be postponed to the time of their attaining their majority, or other period within the boundaries fixed by the Rule against Perpetuities, the gift-over, in the event of there being "no *such* issue," will be equally valid, as referring to the contingency, of no issue acquiring a vested interest under the preceding limitations. In such cases, therefore, that follows, as the direct effect of the construction and wording of the limitations, which is brought about, indirectly and constructively, in those cases, where the gift-over does not expressly refer to the class of issue, previously described, but, is construed to have that relation, under the rule we have been considering, where the issue take as purchasers.

Case, where these words were held to give effect to ulterior limi-

Indeed, the words, "*such* issue," were, in one case, allowed, to give effect to a limitation-over, where the *issue did not take as purchasers*; but the word used in the prior gift was,

"children," instead of, "issue." Thus, (a) a testator bequeathed leasehold property, to his daughter, *and her children*, and in *default of such issue*, and in case of her death, over, to A. and B.: and Sir *Thomas Plumer*, M. R., after saying, that the words, "in case of her death," were sufficient, to confine the failure of issue to the death of the daughter, also remarked, that, independently of that construction, he thought, "that, from the gift being *to the daughter and her children*, there was enough to show, that the latter words were descriptive of *her dying without leaving children*;" and he, accordingly, decided in favor of the ulterior legatees. Doubtless, this construction most accords with, what may be presumed to have been, the testator's intention, in such a case; but, it seems difficult, to reconcile it with the other construction, adopted in the same case, of the *whole interest* vesting in the daughter, by force of the *gift to her and her children*. To produce that effect, "children," must be read, as synonymous with, "issue;" and, it has before been said, that such is, generally, the proper interpretation of that word. But, if that be so, there seems an end of all argument, in favor of a restricted failure of issue, so far as it is derived from the word, "such," because the issue, previously described, has been ascertained to be, the whole line of issue of the first taker, however remote, (b) and, also, because they do not take as purchasers. It seems impossible, therefore, upon strict rules of law, to evade one of two constructions: either, that the *children take as purchasers*, so as to validate the gift-over: or, that, "children," is a word of limitation; in which case, the failure of issue subsequently mentioned must, necessarily, be an indefinite failure, and that makes the *gift-over void* for remoteness.

It is to be remarked, in conclusion of this subject, that the doctrine of referential construction has hitherto only

tation, although "issue," in preceding gift, operated as a word of limitation.

Rule not yet extended to limitations in deeds.

(a) *Gawler v. Cadby*, Jac. 346.

(b) *Vide*, Prior on "Issue," 145.

had place, in regard to limitations in *wills*, as well, where the subject-matter has been personalty, as, where it was real estate; occasion having, apparently, never arisen, for the judicial consideration of the question, of the applicability of the rule to limitations in instruments *inter vivos*.

SUBDIVISION 4.

The operation of 7 Gul. 4 and 1 Vict., c. 26, s. 29, upon testamentary limitations of personal estate, to take effect on a dying without issue.

Introductory
observations.

Having thus ascertained, the general rules of law applicable to limitations of personal estate after a failure of issue, and having, also, discovered, what expressions and circumstances are allowed to have the effect of restricting words, primarily importing a general failure of issue, to a dying without issue living at the death, and having, further, inquired into the different exceptions to the rule, which invalidates a gift of chattels, depending upon an indefinite failure of issue, as those several subjects stand unaffected by the statute, 1 Vict. c. 26, it will now be proper, to take a short notice of the alterations, direct or consequential, introduced by the recent enactment. It is obvious, however, that those alterations are far less extensive, in reference to limitations of personalty, than, as respects limitations of real estate, on account of the strong inclination which has always been evinced, in favor of a restricted interpretation of words importing a failure of issue, when the subject-matter of the gift is personal estate.

Nature of
recent enact-
ment.

The reiteration of the terms of the recent enactment will be unnecessary: suffice it to remind the reader, that, in any bequest of personal estate, words, importing failure of issue of a person, are, by the new law, to be construed to mean,

a failure of issue, in the lifetime or at the death of such person, unless a contrary intention appears, by reason of such person having a prior estate-tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate-tail to such person or issue; the enactment not to be extended to cases, where the before-mentioned words import, if no issue described in a preceding gift shall be born, or if there shall be no issue, who shall attain the age, or answer the description, required for obtaining a vested estate, by a preceding gift to such issue.

1. The first observation which occurs, with respect to this new law, is, that in every case of a simple bequest of a term or other chattel, to a person, (whether with or without words of representation,) with a limitation-over, upon his death without issue, or upon the failure of issue of a stranger, the prior legatee takes the absolute interest in the chattel, defeasible on his death without leaving issue living at that time, or, (as the case may be) on the death of the stranger without leaving issue surviving him.

Effect of new rule of construction, on bequest to A., and on his death, or death of another, without issue, over;

2. If there be a bequest to A., after the death of B. without issue, no preceding gift being made to B., the bequest to A. will take effect, in the event of the death of B., without leaving issue living at that time.

—to A., after the death of B. without issue;

3. If the property be limited to the first taker, for his life only, that interest will not be enlarged, by virtue of a subsequent limitation-over on his death without issue; (such enlargement taking place, only, where, in a similar limitation of realty, an estate-tail would be raised, by implication, in the first taker, and such implication not being admissible, where the failure of issue is restricted;) but that limitation-over will take place, as an Executory bequest, to arise, in the event of the death of the first taker, without leaving issue then living. If, therefore, he leave issue surviving him, the gift-over will fail of effect, and, as there is no express gift to the issue, there will, consequently, be (as it should seem) an intestacy.

—to A. for life, and after his death without issue, to B.

Whether, in such a case, the issue take any interest, by implication.

The same degree of doubt, indeed, may be considered to attach to the question, whether any interest would, in such a case, be implied, in favor of the issue, as has been before said (c) to exist, in regard to similar devises of real estate. Where (d) a bequest was made of the *interest* of a sum of money, to a person, for life, and after her decease *without child or children*, the *principal* and interest to go over, Sir *Thomas Plumer*, M. R., held, that, on the death of the first legatee leaving children, they took the legacy, by necessary implication. But, it must be noticed, that, in this case, besides the circumstance, of the gift-over being, in default of *children* of the first taker, and of the marked distinction, between the interest and the principal, in the prior gift, and the limitation-over, there were prefatory expressions, which plainly implied, that, though the first taker was to be confined to a life interest, the testator intended, her family to have the benefit of the legacy. The decision, cannot, therefore, be treated, as an authority, applicable to the case of a bequest for life, with a limitation-over, upon the death of the first taker without *issue*, (then living; as necessarily implied in the contingency expressed;) without any stronger circumstance, manifesting an intention, to give the property to the issue, should any survive the first taker.

On the other hand, in a more recent case, (e) where a sum of 5000*l.*, stock, was bequeathed, in trust for A., for life, and in case he married a woman, with a fortune of a specified amount, the 5000*l.* to be settled on his wife, and the issue of such marriage, but, in case of A.'s decease,

(c) *Vide supra*, p. 296.

(d) *Ex parte Rogers*, 2 Madd. 449. And see, *Lethieullier v. Tracy*, 3 Atk. 784. But, in the latter case, the testator had previously limited estates by purchase, to particular issue, which favored the implication of a similar gift, to the issue not included in the preceding limitations. Moreover, no

argument was addressed to the Court, against the raising of a gift by purchase: it had reference only to the question of the implication of an *estate-tail*; for which, there was, clearly, no pretext.

(e) *Greene v. Ward*, 1 Russ. 262; stated to have been affirmed on appeal, 2 My. & K. 446.

leaving no issue of his body, then, over; A. married a woman, who had not the fortune required by the will, and died, leaving issue of that marriage: and Lord *Gifford*, M. R., (having previously determined, that the fund was given over, not, in the event of A.'s death without leaving issue of a marriage, with a woman who had the requisite fortune, but only, in case he died without leaving *any* issue of his body,) held, that no gift could be implied in favor of the issue of A., who survived him, but that the fund fell into the residue. His lordship observed, that, "if a sum of money is bequeathed to A. B., for life, and if he dies leaving no issue, then, to another, that does not raise any implication, in favor of the issue of A. B., though, if he dies leaving issue, the gift-over does not take effect."

In a still more recent case, (*f*) G. C. bequeathed, as follows:—"The remainder of my property I may die possessed of, I leave to my late father's two natural children, to be placed in the British funds, and the interest accruing therefrom to be equally divided, and paid to them for their support; but in the event of the death of either, the whole of the interest to be paid to the survivor; and on his or her demise, *should they leave no children*, I direct, my property to be equally divided amongst my friends, my executors, or their children." Both the children left issue surviving them; and a bill was filed by the surviving child (and also personal representative) of one of the children, against the widow and child of the other, for a declaration of the rights of the parties. The chief question made was, whether the survivor took the *whole* property, subject only to an Executory bequest, in case *neither* of the children left children surviving. On the first hearing of the cause, it appears, that the Court considered, the next of kin had no interest; which showed, either, that the first takers, or one of them, had an absolute interest, subject to a gift-over (in an event which had not

(*f*) *Clarke v. Lubbock*, 1 You. & Coll. N. C. C. 492.

happened); or, that the children of the first taker were entitled to the property, under an implied gift. The Court, the cause coming on for hearing on further directions, held, that, as both the children had survived the testator, and had left children, one child, *or the issue of one child*, could claim no more than a moiety. The decree made was to the effect, that one moiety belonged to the plaintiff, and the other, to the defendants, (the widow and child of one of the children,) *or one of them*, and that the dividends of the latter moiety should be paid to the widow, she undertaking, properly to educate and maintain the child, *without prejudice to any question between the widow and child*. This decree, therefore, obviously, leaves undecided, the question under notice: for, as to the moiety decreed to the plaintiff, he was clearly entitled to it, either as representative of his deceased parent, or in his own right. It will remain to be decided, between the widow (who was, doubtless, also representative,) and the child of the other legatee, whether the property can be carried to the latter, by implication. The only alternative to such a construction is, that, under the preceding bequest, the children respectively took *absolute interests*, subject to be divested, in case of their respective deaths, without leaving children surviving. Should the latter construction prevail, the point under notice will still remain *res non judicata*.

Amid these, seemingly contradictory, opinions, it would not be proper, to hazard any view, with respect to the decision, which may ultimately be arrived at, when this question calls for distinct consideration. It may be observed, however, that, the manifest violence done to the intentions of the testator, by confining the interest of the parent, to his life, without, at the same time, raising an implication, in favor of his issue, must have material weight, in opposition to such a construction, and will, at all events, incline any Court, which may be called upon to adjudicate the point, to avail itself of any slight circumstances and

expressions, affording additional ground for the implication of a gift to the issue. And this view is confirmed by the reflection, that it was, manifestly, *extra* the mind of the legislature, in the enactment we are considering, to interfere with the interests *of the issue*, in such a case, to any greater extent, than the adoption of one uniform rule of construction, for the purpose of validating limitations, *upon the failure of* such issue, might require. It is to be observed, that, in the event of an opinion unfavorable to the interests of the issue, being ultimately arrived at, an important difference will exist, between a devise of real estate, to a person, for life, and after his death without issue, over, and a similar bequest of personalty; in that, in regard to the former, the ulterior limitation will, as a contingent remainder, be destructible by the tenant for life, while, with respect to the latter, it will, as an Executory bequest, be free from the tortious alienation, or other act, of the first taker, and will have effect, or not, according to the event.

4. Of course, where personal estate is bequeathed to an individual, absolutely or indefinitely, with a limitation-over, in the event of the death of the first taker and of another person, without issue, the effect of the new enactment is, to vest the whole interest in the property, in the former, defeasible on the deaths of himself and the other person named, without issue living at the time of their respective deceases. And if, instead of the whole term passing to the first taker under the prior bequest, his interest be confined to his life, the effect will be, not only to prevent any enlargement of that interest, (which could not be effected by means of the indefinite construction,) but, also, to give place to the ulterior bequest, in the event of the two parents or ancestors respectively leaving no issue behind them. And, in such a case, it should seem, that there can be little ground, for raising any implication in favor of the two classes of issue, (in the event of there being any,) whatever construction may obtain in regard to a case, where the bequest-over is to take effect on

Effect of new law, on bequest to A., and on death of A. and B. without issue, to C. ;

the failure of issue of the legatee for life *solely*; inasmuch as, before the recent act, the absolute interest would not have vested in both the persons, the failure of whose issue is referred to, nor even in the first taker alone. (g)

And where preceding bequest to ancestor, in words which would create estate-tail in realty.

5. Where a term or other personal estate is bequeathed to a person, by such words as, in the case of real estate, would vest an estate-tail in him, by direct limitation, or by the operation of the *Rule in Shelley's case*, the rule of construction will, it should seem, be the same, under the new statute, as that which previously obtained; *viz.*, the absolute interest will vest in the legatee, and any limitation-over, on his death without issue, will be void, as too remote. If, indeed, the very words of the act be abided by, there will be some difficulty, in bringing this kind of limitation within the general exception, from the rule of construction enacted by it, which provides for those cases, where an intention, contrary to that construction, shall appear by the will, by reason of the person, the failure of whose issue is referred to, having a prior *estate-tail*, or of a preceding gift being, without any implication, a *limitation of an estate-tail*, to such person, or his issue. This exception, it will be observed, does not, in terms, contemplate the case of a previous gift of *personal* estate, by words which give the *absolute interest* in chattels, as the construction, parallel to the devise of an estate-tail in realty; and a captious adherence to strict technical language might, therefore, justify the application of the restricted interpretation, established by the recent statute, even to those cases, where there is an express bequest to the first taker and the heirs of his body. An equitable attention, however, to the spirit and meaning of the provision in question, will preserve it from the disrepute, of authorizing two different rules of construction, in regard to cases, in most respects, similar, in their nature, and differing, chiefly in the quality of the subject-matter of the gift.

(g) *Vide supra*, p. 185.

6. Connected with the last observation, is the remark, that where personal estate is bequeathed, to a person, and the heirs of his body, or to a person, for life, and afterwards, to the heirs of his body, and, in the event of his death without *leaving* issue, to another, the limitation-over would seem to be good, notwithstanding the case is embraced by the exception, of words, referring to a failure of issue, after a preceding express estate-tail, from the rule of interpretation established by the new statute. It will be remembered, (*h*) that, as to bequests not governed by 1 Vict. c. 26, a limitation of personalty, after a preceding gift to a person and the heirs of his body, to take effect in the event of his death without *leaving* issue, is good; the word, "leaving," having its usual restrictive force, notwithstanding the circumstance, of the previous gift being *expressly* made to the first taker, and the heirs of his body. And, although the recent enactment has assimilated the legal signification of the words, "dying without issue," or, "without having issue," to that of, "dying without leaving issue," in regard to the cases, in which those expressions do not occur after the limitation of an express estate-tail, it should seem, that the words, "*leaving* issue," still retain their appropriate and peculiar force, in those cases, which are excepted from the operation of the general rule of construction laid down in the act. There does not seem to be any ground, for supposing, that the legislature intended, in *any* case, to *extend* the proper signification of the word, "leaving;" but, rather, to leave the rule of interpretation, applicable to each of the expressions above-mentioned, *in statu quo fuit*, in regard to such limitations, as are expressly excepted from the operation of the new enactment.

As to effect of "leaving," where it occurs in gift-over, after express limitation to ancestor and his issue.

7. As was observed, in relation to the effect of the new rule of construction upon limitations of real estate, (*i*) so here, it is to be noted, that the application of that rule is

New rule does not apply to case of a bequest on failure of issue

(*h*) *Vide supra*, p. 328.

(*i*) *Vide supra*, p. 298, 299.

of deceased
person.

precluded, where the person, the failure of whose issue is referred to, is dead at the time of the creation of the limitations; it being then impossible, to refer the dying without issue, to the period of his death, and no other than an *indefinite* failure of issue being the alternative construction.

Effect of new
rule on appli-
cation of
referential con-
struction.

8. The exception, in the act, of cases, where words, importing failure of issue, refer to issue taking under a preceding gift, obviously, exempts from the new rule of interpretation, all limitations, capable of being brought within the doctrine of referential construction, the discussion of which occupied our last Subdivision.

Whenever, however, in any given case, it is ascertained, that that rule is not applicable, the effect of the recent enactment will, simply, be, to render the interests of the issue entitled under the prior limitation, defeasible on the death of the parent or ancestor, without leaving any issue surviving him; and, of consequence, the ulterior gift will be open to no objection of remoteness.

General obser-
vations, as to
operation of
recent enact-
ment upon
gifts of
personalty.

9. In fine, it is to be observed, that the general tendency of the recent enactment will be less observable, and the revolution introduced by it, less extensive, in regard to the law of limitations of personal estates, than, with reference to devises of realty; and *that*, as well, because there is less variety in the modifications of interest and ownership, of which personalty is susceptible, as, also, because of the constant disposition, always more or less decided, to approximate to the restricted rule of interpretation, recently established, in the construction of limitations of chattels, to take effect after or upon the failure of issue of a person. Its effect may, generally, be deemed advantageous, as facilitating the settlement of a species of property, to which, the necessities of a commercial commonwealth have given an importance, little inferior to that of the more perdurable realty.

It has been formerly shown, that where real estate is given to a person, in fee, subject to a limitation-over, on his death without heirs, to a person who is inheritable to the first taker, the effect is, to raise an estate-tail in the latter, with a remainder expectant thereon, to the person, in whose favor the ulterior limitation is made. It frequently happens, that a similar disposition is made of personalty, or that real and personal estate are comprised in one general gift, of the character just mentioned. In such cases, the Courts have applied the same principle of construction, and have held, that the absolute interest of the property vests in the first taker, and that the ulterior gift is void, as depending on an indefinite failure of issue.

Where estate-tail raised in realty, under gift-over on failure of "heirs," first taker has absolute interest in personalty.

Thus; the interpretation of the word, "heirs," to mean, "issue," in a bequest of personalty, prevailed, half-a-century since, in a case, (*j*) where a person, possessed of a term, bequeathed it, "to his grandson, P., son of D., and his wife, and the heirs lawfully of him for ever, but in case he should happen to die, and leave no lawful heir, then and in that case, he gave it, after the death of his said grandson, to the next eldest son or heir of D. and his wife; and, so on, to the next eldest son or heir, if the last should die without heirs:" P. having died without issue, an ejectment was brought, by the next eldest son of D.: and it was held, in B. R., that it was apparent on the will, that the testator, by, "lawful heirs," meant, "heirs of the body," and that, "leaving no lawful heir," must be confined to, "leaving no issue at the time of his death;" which construction entitled the legatee-over.

Authorities proving this.

And the construction, of the absolute interest vesting under a bequest in default of heirs, was also adopted in a very recent case, (*k*) where a testator bequeathed a leasehold house, with the furniture, plate, &c., thereunto belonging, to his son, R.; "and should he die without heir or will,

(*j*) *Goodtitle d. Peake v. Pegden*,
2 T. R. 720.

(*k*) *Green v. Harvey*, 1 Hare, 428.

the profits of the said house to be equally divided between all the testator's grandchildren:" R. having died without issue and intestate, a question arose, between the representatives of the deceased son, and the grandchildren, as to the right to the property: and Sir *J. Wigram*, V. C., decided, that the gift to R. was absolute in the first instance, as the testator, in referring to the heir of his son, must, of necessity, mean, issue; and, being of opinion, that the gift-over, in case of the legatee not making any will, was void, the learned judge declared, the representatives of R. entitled.

And, again, in a still later case, (*l*) a testator, possessed of personal property only, by his will, directed, that the interest on his property should be divided into four equal shares: one share to be given to his wife, for life, and, then, to devolve to his children, and the longest liver, in equal shares; the remaining three shares to be divided equally between his three children and their heirs; with a direction, thus:—"should all my children die without *heirs*, my property, in that case, to be divided equally between the children of my brothers and sisters alive on the death of my last child." Questions arising as to the construction of this will, no doubt was made at the bar, as to the propriety of construing the word, "*heirs*," in the ulterior gift, in the sense of "*issue*;" and Sir *J. L. Knight Bruce*, V. C., decided, that such was the interpretation to be put upon it.

Whether
"heirs" to be
interpreted in
the sense of
next of kin,
when subject-
matter is
personalty.

It seems (*m*) to be a question, in these cases, whether, anterior to the inquiry, as to the relationship of the ulterior legatee to the first taker, the word, *heirs*, is to be regarded, as meaning, *next of kin*, and not, strictly, the line of persons inheritable to real estate. There can be little doubt, that, under ordinary circumstances, the word, "*heirs*," in limitations of personal estate, must be thus interpreted. But the difficulty, in extending this rule to the class of gifts in question, consists in this:—that the constructive change of,

(*l*) *Garratt v. Cockerell*, 1 You. & Coll. N. C. C. 494.

(*m*) See the argument in *Garratt v. Cockerell*, *supra*.

“heirs,” into, “heirs of the body,” is merely a restriction of the term, to heirs *special* (which, obviously, assumes, that it retains its proper meaning); whereas, if the word is understood, to refer to a class of persons, of a wholly different character, and succeeding in a manner, in no way connected with, or analogous to, heirship, the basis, on which the alteration of, “heirs,” into, “issue,” rests, entirely fails.

Finally, it is to be observed, that the construction of testamentary limitations of personalty, on a dying without heirs, or, without heirs of the body, has experienced no statutory change, similar to that, which has been effected, in regard to gifts on a failure of *issue*; and, therefore, the indefinite interpretation, and its consequences, still prevail, with respect to such gifts, as well in wills, as in deeds.

Limitations on failure of “heirs” or “heirs of the body,” not affected by 1 Vict. c. 26.

CHAPTER XVI.

OF THE RULE AGAINST PERPETUITIES, AS IT AFFECTS REMAINDERS, AND LIMITATIONS IN THE NATURE OF REMAINDERS; AND THEREIN, OF THE DOCTRINE OF CY-PRÉS.

THE limitations, to which our attention has been hitherto confined, were, either, Executory devises and bequests, or Springing and Shifting Uses, or Trusts of the like nature.

Sometimes supposed, that remainders are not within the scope of the laws against remoteness; and why.

And it may, probably, on the first view, appear, that these several classes of limitations exhaust the doctrine of perpetuity, in respect of the seeming inapplicability of the rule, to limitations of direct remainders at Common law. Indeed, as much has been, in effect, said, by writers of even more than ordinary repute.

Thus, the Commissioners on the law of Real Property commence their observations on the subject of Perpetuities, with the following statement: (n)—“ All future interests, *not being remainders*, are restrained in their limits by the Rules of law relating to Perpetuities.” An opinion, thus sanctioned, deserves great respect; but it is conceived, that, upon both principle and authority, it must be dissented from.

The notion in question is, perhaps, in some degree, to be accounted for, from the confused and involved character of the opinions generally entertained upon the subject, until within very recent times, and from the inherent difficulty in the way of a clear application of the principles and doctrines of remoteness, to limitations, by way of particular-estate and

(n) Third Report, p. 29.

remainder (the only other class of gifts besides those above referred to).

The rule, that the remainder must vest during the continuance of the particular-estate, or *eo instanti* of its determination, may be, and frequently is, supposed, to favor this notion of the inapplicability of the laws against remoteness to strict remainders.

And, in truth, this reason would be all-sufficient, were it not, that particular-estates for life may be limited to persons unborn; since, as, in that case, every particular-estate must be limited to a person *in esse*, and every remainder must take effect immediately on the determination of such particular-estate, or, not at all, there could be no possible danger of a tendency to undue remoteness in a remainder, because the period of the suspension of full enjoyment of the property could, in no case, exceed a life in being, or the survivor of several lives in being, where two or more life-estates were limited. But, as it is well established, that a particular-estate for life may be granted to a person unborn, and that remainders may be limited after such estates, there is no necessary guarantee for the non-violation of the law against Perpetuities, because, if the vesting of the remainder be postponed to the decease of the unborn tenant for life, the boundary of a life in being, and twenty-one years, will not be observed. It is true, the unborn tenant for life may die, and the remainder come into possession, within the period allowed by law, but, as we have seen, the Rule against Perpetuities is not satisfied, by the mere *possibility* of its limits not being transgressed. The primary or moving cause, then, of the extension of the doctrine of perpetuity, to limitations of remainders, is to be found, in the circumstance, of their being allowed to be limited, after prior gifts to unborn persons, for life.

Remainders may be too remote, because particular-estates may be limited to unborn persons.

But, in order to show the connexion between the doctrine, that life-estates may be limited to persons unborn, and the rule, that remainders are within the scope of the laws against

Nature of rule, that remainder must vest at determination of particular-estate.

remoteness, it is necessary, to consider, what is the exact meaning of the rule of law, that a remainder must vest, before or at the determination of the particular-estate. If the rule require, that every contingent remainder should vest, by the time of the expiration of the *first* freehold estate, (which must, necessarily, be limited to a person *in esse*;) if, in fact, the term, *particular-estate*, mean, the freehold interest first in the order of the limitations, then, obviously, all tendency to remoteness in a remainder is precluded, and it would be unscientific, to say the least, to speak of a remainder, as, in any possible case, too remote.

The rule, it is conceived, amounts, simply, to this,—that *some preceding freehold estate must subsist and endure*, until the time when the contingent remainder vests. It is true, opinions have been entertained, that the rule requires, every contingent remainder to vest during the continuance of the *first* freehold estate ; in other words, that the term, the particular-estate, means, the estate first limited : but the writer is unable to discover any authority, or, even, *dictum*, of either judge, or text-writer, warranting such a construction of the rule in question. All the partial freehold estates amount, in fact, to one aggregate interest, prior to the determination of which, any contingent remainder may vest. Thus, if land be settled, to the use of A., for life, and, after his decease, to the use of B., for life, and, after his decease, to the first and other sons of B., or of C., in tail, it is undeniable, that if any son of B., or C., be born, in the lifetime of B., although after the decease of A., that son is capable of taking under the ulterior remainder. This seems, indeed, to be conceded, when all the partial estates are limited to persons *in esse* ; but a distinction has been said to exist, in regard to cases, where either of those estates is itself contingent, as limited to a person unborn. But, it may be asked, what intelligible ground of distinction this circumstance affords, if it be clearly settled, that a life-estate, limited to a person unborn, is as valid, as a similar interest,

created in favor of a person *in esse*? That fact ascertained, it is difficult to understand, why a freehold estate, limited to a person unborn, may not, if it actually take effect in possession, serve as the particular-estate, during whose continuance, the next succeeding contingent remainder is to vest, as well as a life-interest, limited to a person *in existence*, after the determination of a prior freehold, and which, in its turn, becomes the estate, at the determination whereof, the next remainder is to take effect. If the unborn person, to whom the ulterior life-interest is limited, be not *in esse*, at the determination of the preceding particular-estate, it fails, and the contingent remainder, dependent upon the two partial estates, must vest, and, in default of that, some succeeding remainder. But the possibility, that the life-interest of the person *in esse* may, ultimately, and in event, become the single particular-estate, on which the contingent remainder is expectant, is, obviously, a matter of no consideration; for the contingency, that the life-interest of the unborn person, may be such particular-estate, is sufficient, to show, that there is no necessary preventive of the objection of remoteness.

In other words, the rule is, that, until the contingency arises, the interest, depending on it, must be supported by some preceding particular-estate of freehold, vested in interest, and in relation to which, the estate, to arise on the contingency, is a remainder; and that the remainder must vest in interest, before the determination of such vested estate, or in the instant, in which that estate determines. (o) And it is clear, therefore, that if the freehold, limited to the unborn person, vest, at or before the determination of the first freehold interest, the ulterior contingent remainder will be supported by a preceding vested estate; (during the continuance of the first freehold, by it, and, after its expiration, by the subsequent particular-estate;) and that the rule will be satisfied, if that remainder be capable of taking effect, at

(o) 1 Prest. Estates, 243.

the determination of the vested interest, by which it is so preceded.

Thus much, then, upon the rule, as to the period for the vesting of remainders, as influenced by the circumstance, of life-estates being allowed to be limited to persons unborn.

Limitations
after gifts to
unborn persons
clearly
remainders.

To complete the theoretic proof of the doctrine, that remainders may be too remote, it only remains, to show, that, where limitations are made, after gifts to persons unborn, for life, either to persons *in esse*, or to the issue of such unborn tenants for life, those limitations are, in the strict sense of the term, *remainders*. And this may be proved, even upon the hypothesis, that the first freehold estate is that, during whose continuance, or at whose determination, the contingent remainder must vest. For, what is the invariable test, as to the mode of operation of future limitations of real estate? It is, that, if the limitation may, possibly, take effect, as a remainder, it shall never operate, as an Executory devise, or Springing, or Shifting use. (p) If this criterion be applied, in the supposed case, it is clear, that, as it is possible, for any limitation to a person or persons unborn to vest before the determination of a prior freehold estate, (there being, of course, no extraneous restriction, as to the birth of such persons taking place after the expiration of the preceding interest,) such limitation must always be of the character of a remainder. And, if the *preceding* or *last-continuing* particular-estate be that, during whose continuance, the remainder is to vest, it is obvious, the argument is, if possible, still stronger.

Mr. Fearne's,
Mr. Preston's,
and Mr.
Jarman's
accordance
with the
doctrine, that
remainders

In support of the practical conclusion from these sentiments, are to be adduced, the opinions of several established text-writers. Mr. *Fearne* remarks, (q) that "any limitation, in future, or by way of remainder, of lands of inheritance, which, in its nature, tends to a perpetuity, even

(p) *Vide supra*, pp. 76, 107.

(q) C. B. p. 502.

although there be a preceding vested freehold, so as to take it out of the description of an Executory devise, is by our Courts considered, as void in its creation; as in the case, of a limitation of lands in succession, first, to a person *in esse*, and, after his decease, to his unborn children, and, afterwards, to the children of such unborn children, this last *remainder* is absolutely void." And so, Mr. Preston, though taking a somewhat artificial distinction, between the remoteness of a *remainder*, and the remoteness of the *event on which it depends*, (r) says,—“A *remainder* may be too remote and void, because it is limited to the children of a person unborn, and to whom a prior estate for life is limited; and all limitations-over, *by way of remainder*, after and expectant on a remainder which is too remote, will, also, be void.” And, in another place, (s) the same gentleman speaks of remainders being “obnoxious to the objection of contravening the policy of law against perpetuities:” and, elsewhere, (t) he has treated it, as perfectly clear, that remainders may be open to the objection of remoteness. The author of the *Treatise on Wills*, also, in various parts of the section of his work which relates to the Rule against Perpetuities, (u) has discussed that subject, upon the clear understanding, that strict remainders at Common law are embraced by it.

may be too remote.

In addition to these opinions, are to be adduced, two cases, which, the writer ventures to conceive, are conclusive authorities in favor of the doctrine here maintained. The first is the famous one of *Hopkins v. Hopkins*, (v) the facts of which were, shortly, these:—A testator devised real estate, to the use of trustees, and their heirs, upon trust for S. H., only son of J. H., for life, and after his decease, in trust for the first and other sons of his body, successively in

Case of
Hopkins v.
Hopkins.

(r) 2 Essay on Abst. 114, 115.

(s) Ib. 148.

(t) Ib. 166, 168.

(u) See pp. 226, 229, 230, 236, n.,

240, 241, 260, 261.

(v) 1 Atk. 580; 1 West, 606;
Butl. n. to Co. Litt. 271, b.

tail-male, and in default of such issue, in case J. H. should have any other son or sons of his body, then, in trust for all and every such other son and sons, respectively and successively, for life, with like remainders, to their several sons, as are limited to the issue male of S. H., and for default of such issue, then, in trust for the first and every other son of C. H., the eldest daughter of J. H., successively, for life, with remainder, to the heirs male of their respective bodies, with similar limitations to the sons of three other daughters of J. H., or, to the sons of any other daughters which he might afterwards have born, and for default of such issue, in trust for the first and every other son of H. D., successively, for life, with divers remainders-over. S. H. died in the lifetime of the testator; and J. H., after the death of the testator, had another son, W., who lived only a few months. There being no issue male of J. H., or of any of his daughters, the eldest son of H. D. claimed to be entitled to the estates devised, under the limitations to the first and other sons of H. D. In support of this claim, it was contended, that, although by the death of S. H., in the testator's lifetime, all the limitations were executory, yet, on the subsequent birth of W., the estate for life, given to him, vested, and the ulterior limitations became remainders; and that all the intermediate limitations failing, as such, by reason of the non-existence of the objects of them, at the decease of W., the remainder to the eldest son of H. D. was the first vested remainder; which, therefore, took effect. It was further argued, on the same side, that if the subsequent limitations could not take effect, as Executory devises, neither could they be good, as contingent remainders, because they were not to come *in esse*, within that compass of time which the law allowed. On the other hand, it was said, that the estate, vested in the trustees, was sufficient, to support the contingent remainders, though no particular trust was declared: it was admitted, however, that the subsequent limitations to the sons of sons

unborn were bad, but, it was said, that did not affect the question under consideration; *they might be altogether struck out*, or might, more properly, be construed as creating estates-tail. Lord Chancellor *Hardwicke* held, that the subsequent contingent limitations could not be supported, as so many distinct Executory devises, but that they must all be considered as remainders. His lordship then proceeded to observe, that it was *not necessary*, in order to bar the plaintiff from having an immediate conveyance, that all the contingent limitations, intervening the estate limited to *S. H.*, and that to the plaintiff, should be good subsisting contingent remainders: it was sufficient if some of them were good, for, then, so long as they continued, the plaintiff could not be let in. The Lord Chancellor, then, decided, that the legal estate in the trustees was sufficient to support *such of the contingent remainders as were valid*; and the bill for a conveyance was, consequently, dismissed. In this case, then, we have a decision, that limitations to unborn persons and their children, successively, after an estate of freehold, are contingent remainders; and an admission, at the same time, that such remainders may be void, on the ground of remoteness.

The other authority, alluded to, is the case of *Seaward v. Willock*, (*w*) where there was a devise, "to A., for life, and after him, to his eldest or any other son after him, for life, and after them, to as many of his descendants, issue male, as shall be heirs of his or their bodies, down to the tenth generation, during their natural lives." A. having become bankrupt, the property was sold by the assignees, and, upon an action by the purchaser, for return of the deposit, on the ground of a good title to the fee-simple not being deduced, it was contended, on the part of A., that he took an estate-tail, in order to effectuate the general intention, by that the property should be inherited, in succession, by his issue

Case of
Seaward v.
Willock.

(w) 5 East, 198. See also *Beard v. Westcott*, 5 Taunt. 393.

male. But it was held, in *B. R.*, that the estate of *A.* could not be enlarged, as there was no general intent, to give a descendible estate to the issue of the first devisee, but a single intent, to create a *succession of estates for life, not warranted by the law*. And, throughout the judgment, it is observable, that it was treated, as clear, that if the first taker had only an estate for life, *all his sons, except one, and the issue of all such sons, would be excluded*. In this case, then, there were limitations of strict Common law remainders, deemed void on the ground of remoteness.

After this attempt, to support the view, here taken, of the question, of the applicability of the laws against remoteness, to limitations of remainders at Common law, as well, by reason and analogy, as, by authority, the writer trusts, he shall escape the charge of presumption, in advancing a doctrine, opposed to one, which has, apparently, obtained the concurring assent, of so respectable and learned a body, as the Commissioners on the law of Real Property.

The circumstance of contingent remainders being destructible by acts affecting prior particular-estate, no argument against their tendency to a perpetuity.

It has been sometimes said, (*x*) that contingent remainders being liable to be defeated, by the tortious alienation of the particular-tenants, or, by the merger of the particular-estates in ulterior vested remainders, a sufficient protection is provided against Perpetuities, to entitle such remainders, to exemption, from the operation of the Rule for their prevention.

This argument, however, is exposed to the remark, that it meets those cases only, in which, there is no intervening estate limited to trustees, for the purpose of preserving the contingent remainders. Besides, it assumes a regard, on the part of the law, to, and a prospective provision for, acts and consequences, which it deems wrongful, and which, therefore, it cannot, with consistency, presume. And to this objection, in point of principle, is to be added, the absence of all authority for the doctrine in question, and the exist-

(*x*) 2 *Prest. Abst.* 114. *Rand. Perp.* 93, *et seq.*

ence of some of a contrary tendency, if respect be had to the analogy afforded by the rule, which refuses to force on a purchaser, a title to property, based on a tortious destruction of contingent remainders. On all the grounds of objection, then, to which the validity of any argument can be exposed, that, here referred to, seems disentitled to our confidence and reception. (y)

The operation of the Rule against Perpetuities, upon limitations by way of remainder, being thus ascertained, it will be proper, to proceed in the inquiry, as to what remainders are thereby rendered void for remoteness, and, what are valid. And in this, as in every, application of the doctrine of perpetuity, it must be remembered, that the requirement of the Rule is, a *necessary*, and, not merely, a *probable* or *possible*, vesting, within the prescribed limits.

1. It may be laid down, as a universal proposition upon this subject, that every remainder, limited after a particular-estate to an unborn person for life, which is so given, that it cannot vest until the decease of such unborn person, is void, as too remote. It is true, the unborn tenant for life will necessarily come *in esse*, if at all, during a life in being; and if the vesting of the remainder were not postponed for a longer period, than his attainment of the age of twenty-one years, there would be no objection to it, on the ground of remoteness. But, as the period of the death of the unborn tenant for life is indefinite, it is manifest, that the limits of the Rule are transgressed; a whole life not *in esse* being taken for the period of suspension, independently of the time which must elapse prior to the birth of the first taker. It is not, it will be observed, that a remainder cannot be limited after an estate for life to an unborn person, or after a succession of such estates (as was formerly supposed); but that the remainder is, either, not vested immediately, or is not so limited, that it must vest, within the

Remainder not
to vest until
decease of
unborn tenant
for life, void.

(y) See 2 Jarm. Wills, 226.

allowed limits. This may be exemplified by a recent case, in reference to a limitation of personalty. Thus, (z) a testator gave the dividends of stock, to his brother and three sisters, and after the decease of either of them, leaving any children, the share of him or them so dying, to be paid to such children, for their lives, with benefit of survivorship, and in case either of his brother and sisters should die without leaving such issue, then, the survivor or survivors to take the dividends, and after the decease of the survivor of the children of his brother and sisters, the testator directed the stock, and all dividends then due, to be disposed of according to the Statute of Distributions; and it was held, that the bequest of the capital of the stock failed for remoteness, and that it was, therefore, undisposed of, and went to the next of kin of the testator living at his death. Here, we perceive, that the ulterior bequest was necessarily contingent, until the decease of the survivor of the class of unborn persons, (children of the testator's brother and sisters,) as the individuals, who should answer the description of those to whom the capital was given, could not be ascertained until that time. The argument, as reported, extended even so far, as to maintain the invalidity of any gift of an absolute interest, beyond a prior limitation of a life-interest to an unborn child, but it cannot be presumed, that either the advocate or the Court adopted any such doctrine, opposed, as it is, no less to the very authority cited in its behalf, than to all principle and analogy. (a)

(z) *Cooke v. Bowler*, 2 Keen, 54.

(a) A learned writer has observed, with reference to this case, as follows:—"It is not uncommon, to find it stated, in unqualified terms, that, though you may give a life-interest to an unborn person, every ulterior gift is necessarily and absolutely void; and some countenance to this doctrine is to be found, in the judgment, as reported, of an able living judge, (*Cooke*

v. Bowler, 2 Keen, 54,) though the adjudication itself, rightly considered, lends no support to any such doctrine, as the ulterior gift, which was there pronounced to be void, was nothing more than a declaration, that the property should go according to the Statute of Distributions; so that the claim of the next of kin, who was held to be entitled, was perfectly consistent with the will, unless, indeed,

It may be observed, that a remainder, after an estate for life limited to an unborn person, will not be rendered contingent on its determination, by the mere circumstance, of the remainder being introduced by the words, "subject thereto," or the like ; such expressions having reference only to the posteriority of the remainder to the partial estate.

2. A limitation to the unborn child or other issue of an unborn tenant for life, unconfined in regard to the time of the birth of the remoter issue, is absolutely void for remoteness. Such a limitation is necessarily void ; because, as there are no limits to the time, within which the unborn child in the second degree is to come *in esse*, it may happen, that no person, entitled to take under the remainder, will exist, until after the lapse of twenty-one years from the birth of the unborn tenant for life ; and, unless the remainder vests within that period, it, obviously, transgresses the prescribed boundary. It might, also, be supposed, that such a limitation violates the Common law rule, with respect to a *possibility upon a possibility*, as it assumes, first, the event of the birth of a child, and, then, the birth of issue of such child ; but this doctrine can now scarcely be said to be of any authority, since it is clear, that limitations may be made to the unborn issue of an unborn child, if it be provided, that such issue, in the second degree, shall be born, or that their

Remainder to issue of unborn tenant for life, void, if the time of their coming *in esse* be not restricted.

it applied to the next of kin at the death of the unborn legatee for life, which would have been clearly void, as embracing persons, who would not have been ascertainable until more than twenty-one years after a life in being ; but for this construction there seems to have been no ground." 1 Jarm. Wills, 241, 242. With deference to this opinion, it is conceived, the Master of the Rolls *did* decide, that the ultimate limitation was void, upon the ground of its remoteness ; and that, because the limitation was

(rightly or wrongly ; it is of no importance to consider ;) read, as a gift to the next of kin of the testator *living at the decease of the survivor* of the children of his brother and sisters ; which was, clearly, too remote a period, for ascertaining the objects of the gift. If the ulterior limitation merely amounted to a declaration, that they should take, on whom the law would cast the property, wherefore was it "void ?" and how could it "fail for remoteness ?" (to use the very words of the M. R.).

shares shall vest, within the proper period. (b) And this leads us to observe, that,

But if the birth of the remoter issue be limited to happen with the legal period, the remainder is good.

Whitby & Mitchell
44 (2. D. 85)

3. A limitation may be made to an unborn person, for life, with remainder, to the unborn child or other issue of such person, provided, the birth of the issue, entitled under the ulterior remainder, be limited to take place, within the period of lives in being and twenty-one years. (c) In such a case, as the remainder will vest, (if at all,) on the birth of the remoter issue, and as the birth of the issue who are to take, must happen within the prescribed limits of remoteness, the mere fact, that such issue are to be the issue of children, themselves as yet unborn, can be of no weight, in reference to the question of the remoteness of the remainder. If the issue are born within the specified period, although they be in even the third or fourth remove from the living ancestor, the Rule against Perpetuities is still preserved inviolate: and if they are not so born, the remainder will fail, and some ulterior limitation take effect. Upon the same principle, a limitation may be made to A., (a person *in esse*,) for life, with remainder, to his unborn son, or other child, for life, with remainder, to a child of such unborn child, if it be provided, that the issue in the second degree shall be born, during the lifetime of A., or within the period of twenty-one years from his decease. It must be admitted, the authorities do not warrant our saying more, than that, if the birth of the remoter issue is limited to happen *during the lifetime* of the tenant *in esse*, the remainder to them will be good; but, it is conceived, that, upon principle, there can be no question, that advantage may be taken of the whole allowed period, for the purpose of postponing the

(b) See the argument, derived from the old rule against the existence of a possibility upon a possibility, urged in 1 Sug. Pow. 493, 494; Rand. Perp. 102; *arguendo*, *Bengough v. Edridge*, 1 Sim. 232.

(c) *Routledge v. Dorrill*, 2 Ves. jr. 357. And see, *per Preston, arguendo*, *Bengough v. Edridge*, 1 Sim. 251, and *Mogg v. Mogg*, 1 Mer. 664; *Hayes Conv.* 385.

vesting of remainders, as is the case with respect to limitations by way of Executory devise and bequest, and Springing and Shifting Use. (*d*)

4. As every remainder, depending or expectant upon a prior remainder which is void for remoteness, must also be too remote, (*e*) it follows, that, if a limitation be made to A., (a person *in esse*,) for life, with remainder, to his unborn child, for life, with remainder, to a child of that unborn person, by purchase, (such latter remainder being unrestricted in point of time,) with remainder, to the second or other child of A., for life, or otherwise, the ulterior limitation must be void, as being postponed to an unconfined remainder to the unborn child of a person not *in esse*. In such a case, the objection of remoteness, which attaches to the remainder to the unborn issue of the first child of A., necessarily affects the subsequent limitation, in favor of the second or other child of A., although such last-mentioned limitation, regarded *per se*, is free from any tendency to remoteness. But,

A remainder to an unborn child of a person *in esse*, postponed to limitations to another unborn child and his issue, is too remote.

5. If the death and failure of the issue of the first unborn child of A., on which the ulterior remainder is to take effect, be limited to happen within the prescribed period of perpetuity, the mere circumstance, that such limitation is postponed to a remainder, in itself too remote, will not expose it to the objection of remoteness, which attaches to the latter. (*f*) Thus, if land be limited, to A., for life, with remainder, to the first (unborn) son of A., for life, with re-

But if ulterior remainder be restricted to proper period, it is good.

(*d*) The writer is aware, that what has been above advanced is at variance with the positions of some text-writers, (see, F. C. R. 502; 2 Prest. Abst. 166, 168; 1 Sug. Pow. 493; Burt. Elem. Comp. 268; 1 Jarm. Wills, 236 n., 240;) who affirm, that every gift to an unborn person, for life, with remainder, to the child or other issue of such person, is absolutely void. But if the Common law rule, with respect to a possibility upon a

possibility, be no longer of any authority, it is difficult, to conceive, upon what ground, except that of a tendency to remoteness, the limitations in question can be considered invalid; and if that tendency be obviated, by the restriction of the birth of the remainder issue to the proper limits, all objection is, clearly, removed.

(*e*) *Routledge v. Dorril*, *ubi supra*.

(*f*) *Beard v. Westcott*, 5 Taunt. 393; 2 Prest. Abst. 170.

mainder, to the issue of such son, by purchase, there being an ulterior remainder-over, in the event of a failure of issue male of A., *at his death*, or in the event of the death and failure of *issue of such issue male, before they attain their ages of twenty-one years*, it is clear, that the remainder-over is perfectly good, notwithstanding the invalidity of the prior limitation to the issue of the unborn son of A. This rule proves to demonstration, that the only criterion, in deciding the question, of the validity of remainders in regard to remoteness, is, their tendency or non-tendency to a perpetuity, with reference to the limits prescribed by the perpetuity-rule.

Remainder, expectant on a particular-estate for life to a person *in esse*, cannot be too remote.

6. Wherever an estate for life is given to a person *in esse*, a remainder may be limited thereupon, to any class of unborn issue, or other persons, and the vesting of their interests may be postponed to any degree of remoteness, as the remainder must necessarily take effect or fail, at the expiration of a life in being, which is within the Rule. (g) It follows, therefore, that there is no objection to a limitation to A., for life, and after his decease, to all the children of B., who shall attain twenty-five, or other age greater than twenty-one, or to all the children of an unborn child of A.; although both such ulterior limitations would be void, as too remote, if made, independently, by way of Executory devise, or Future use. However remote, in its original and abstract form, the remainder may be, if it takes effect within the prescribed period, there is, obviously, no real perpetuity created; and if, from the rules of law which govern remainders, the limitation in question *must* so take effect, if at all, then, every requirement of the Rule against Perpetuities is satisfied, and it is of little moment, what may be the remoteness of the remainder, regarded abstractedly from its nature and implied consequences, and the circumstances of its operation.

Life-estates may be limited in succession

7. It is a result of the rule, giving effect to every remainder, after a limitation to an unborn person, for life, which

must necessarily take effect within the prescribed boundaries, that a limitation may be made to A., for life, with remainder, to his first son (unborn), for life, with remainder, to a second unborn son, for life, and so on, successively, to all the other children of A., who may be born, for their respective lives; because every one of the successive tenants for life must necessarily be born, and, therefore, each of the remainders, vest, during A.'s lifetime, or within such time after his decease, as the law allows for the birth of posthumous issue. (h) Did each successive remainder for life depend, for its vesting, upon some other event, besides that of the donee surviving the prior unborn tenant for life, which would not necessarily happen within the prescribed limits, all the remainders, subsequent to that to the first unborn son, would be too remote. It is true, each remainderman must, in order to his becoming entitled in possession, survive the other unborn persons, to whom prior estates for life are limited; but this contingency is implied in the very nature of the estates, and does not operate to prevent alienation, by the concurrence of all the persons successively entitled. (i) This leads us to observe, that,

8. Life-estates may, also, be given, successively, to the unborn children of a person *in esse*, if the interests of the successive remainder-men are limited to vest, on their attainment of their ages of twenty-one years, as such event must necessarily happen within twenty-one years after a life in being. And, by consequence, an ultimate remainder may also be limited, expectant upon such life-estates, provided it be, either, presently vested, or, will necessarily vest within the proper period; *e. g.*, a remainder to the unborn child of any other person *in esse*. But, an ultimate remainder,

to unborn tenants for life, children of a person *in esse*.

And that, though the vesting of each life-estate be postponed to the time of successive takers attaining majority.

(h) *Beard v. Westcott*, 5 Taunt. 393. *Hayes Conv.* 385, 386.

(i) It is, surely, *lapseus penna* of a learned writer, to say, that the legal prohibition is against "the engrafting on a life-interest to an unborn person, a remainder-over to the issue of such

person, or any other unborn person." See 1 Jarm. Wills, 236, n. But the same doctrine has been, inadvertently, advanced by other writers. See *Powell's* note to F. Ex. Dev. 327; 1 Sug. Pow. 493; Rand. Perp. 87, 88, 102.

whose vesting is postponed *until the decease* of the survivor of such tenants for life, (notwithstanding the vesting of *their* interests within the prescribed period,) must be void, because that event may transgress the boundaries of perpetuity.

Remainder may be limited to the issue of unborn person, if latter take estate-tail.

9. It will be hereafter seen, that limitations, after or expectant upon estates-tail, are, generally, exempt from the operation of the Rule against Perpetuities, by reason of their destructibility by the disentailing assurance of the tenant in tail. It is a consequence of this rule, that, if a limitation in tail be made to an unborn person, with remainder, to his issue, by purchase, for life, in tail, or in fee, such remainder will not be void for remoteness, although unconfined in regard to the time of the birth of such issue in the second degree, or of the vesting of their interests. (*k*) And, so, it should seem, that, if, *prior* to the limitation to the unborn parent, there be a gift of an estate-tail to *some other person*, the remainder, to the children of the unborn tenant for life, will be equally free from objection, with the limitation to such children, where the *parent* takes an estate-tail.

Remainder void, if made to an unascertained person at age above majority, though there be a person existing, who may answer description, and actually does so.

10. The rule, which requires remainders to be so limited, as to vest within the prescribed period of remoteness, renders a remainder void, if limited to an *unascertained* person or class, who will not necessarily answer the required description within the proper period, although, *as the event turns out*, such person, or the members of such class, be actually in *existence*, at the time of the creation of the limitations. Thus, if there be a gift, to A., for life, and after his decease, to the unborn son of B., for life, and after his decease, to *such son of C., as shall first attain the age of twenty-five years*, the ulterior remainder is, clearly, too remote; although there be a *son of C. in existence*, who *afterwards attains the specified age*; inasmuch as, at the date of the will or settlement, there was a possibility, that an *unborn* son of C. would be the first who should attain the age of twenty-five.

The difference between legal

11. A difficulty seems to arise, as regards the applica-

(*k*) 2 Prest. Abst. 170.

tion of the doctrines of remoteness, to limitations of *equitable* remainders, which are not bound by the same rules, with respect to the time of their taking effect, as remainders at Common law ; there being no rule, requiring an equitable remainder to take effect immediately on the determination of the particular-estate. Without this rule, it is certainly difficult, to discover the guarantee afforded by the limitation of a legal remainder, after a life-estate to a person *in esse*, for the non-violation of the Rule against Perpetuities ; since, if the remainder may take effect at any time, so far as respects its validity as a remainder, there would seem to be a *prima facie* necessity, for the observance of those cautions, in the avoidance of remoteness, which are required in limitations of Executory devises, and Future Uses. The only mode, whereby it seems possible for a Court of equity, to put an interpretation upon such limitations, analogous to that which obtains in regard to Common law remainders, is a constructive annexation to the gift of the remainder, of a qualification, that it shall become capable of taking effect, before or at the determination of the particular-estate. (1) As, if the trust of property be limited, to A., for life, with remainder, to such son of his, as shall first attain twenty-five years of age, such *quasi*-remainder must, (it should seem,) if it be good at all, be so, upon the implied condition, that, at the decease of A., there shall be a son of the requisite age. Unless such a construction be admissible, (and it is not advanced, as one established on unquestionable authority,) there seems no alternative, but the subjecting equitable remainders, to all the restrictions and requirements of the Rule against Perpetuities, as it is applied to Executory limitations.

and equitable remainders, in their relation to the laws against remoteness.

Between equitable remainders, limited after prior life-estates to *persons unborn*, and similar *legal* remainders, no difference seems to exist ; because, as we have seen, there is,

(1) 2 Prest. Abst. 148.

clearly, a necessity, in regard to the latter, for confining the remainder within the prescribed boundaries of remoteness; and no other requisite can exist, with respect to remainders of the trust or equitable interest.

See as to this doctrine OF THE DOCTRINE OF CY-PRÉS.
Edgt of Rolfe B in Moneyferry v Dering 16 the 420.

Although limitations by way of remainder, to the children of unborn persons, are, it has been seen, generally void for remoteness, unless the birth of the remoter issue be confined to happen, within the proper period, there are cases, in which the Courts have so moulded, or put such a construction upon, the limitations, as that the unborn parent may take an estate-tail, and the property vest in his issue by descent; by which all objection of remoteness is obviated. (m)

Nature of this doctrine.

To comprehend the principles on which this doctrine rests, it must be understood, as a rule of law, that, where a testator has two objects, one primary or general, and the other secondary or particular, which are incompatible, the particular intention must be sacrificed, in order that, as far as possible, effect may be given to the general one. (n) If, therefore, a testator manifest a general intention, that a particular unborn devisee and his issue should take certain property, but, in consequence of the interests of the issue being limited by purchase, the particular mode adopted by the testator of carrying into effect his primary intent, be

(m) See, *Butler's* note to F. C. R. 204, *et seq.*; *Powell's* note to F. Ex. Dev. 333; 2 Sug. Pow. 61; 2 Prest. Abst. 166, 167; 1 Madd. Chan. 60; 1 Jarm. Wills, 260; Hayes Principles, &c., 50, 110; Burt. Elem. Comp. 284; Prior on "Issue," 58.

(n) The reader will remark, that the doctrine of general and particular

intention, here alluded to, has no necessary connexion with that, which has been sometimes improperly advanced, in reference to the construction of limitations affected by gift-over on a dying without issue, and which has been subjected to the just censures of some late writers. See *Hayes' Inquiry*, &c., 284.

contrary to law, the Courts have, in support of the testator's general intention, to provide for the issue of the devisee, sometimes held, that the issue shall take derivatively through the ancestor, by vesting an estate-tail in him, which is conformable to the rules of law. This doctrine is called the rule of *approximation*, or *cy-prés*, i. e., of carrying into effect the testator's intentions, as nearly as may be, according to the rules of law.

Thus, in a well-known case, (o) land was devised, to trustees, upon trust, to be conveyed to M., for life, and after his decease, to M., his first son, for life, and so, to the first son of that first son, for life, &c., and if no issue male of the first son, then, to the second son of M., for life, and so, to his first son, &c., with remainders-over, to about fifty others, for their lives, successively, and so on, without giving an estate-tail to any of them, or making a disposition of the fee: and Lord Chancellor *Cowper* held, that the limitation to the unborn sons of M., with remainders to their issue, created a perpetuity; but decreed, that the conveyance should be as near the intent as the rules of law would admit; viz., by making all the sons of M., in being at the testator's decease, tenants for life, with remainders to their issue, and limiting estates-tail to the sons unborn.

Case of
Humberston v.
Humberston.

So, again, in another case, (p) a testator gave certain estates, to his nephew, W. B., eldest son of his brother, R., for life, remainder, to his first and other sons, in strict settlement, remainder, to the second son of the testator's brother, for life, and after the death of such second son, to the first son of his body, and the heirs male of his body, and for default of such issue, to the second, third, fourth, fifth, and every other son and sons of the said second son of the testator's brother, successively, and to the heirs male of their several bodies: the testator's brother had only one son, W., born in the testator's lifetime, but he had a second son, T.,

Case of
Chapman d.
Oliver v.
Brown.

(o) *Humberston v. Humberston*, 1 P. Wms. 332.

(p) *Chapman d. Oliver v. Brown*, 3 Burr. 1626.

born after the testator's death, and in the lifetime of W. ; W. died without issue, and, then, the second son entered, and suffered a recovery : and upon the question, whether T., the second son of R., who was not born until after the testator's death, took an estate-tail, or only an estate for life, it was held, by the Court of B. R., that the second son took an estate-tail, for the purpose of effectuating the general intention of the testator.

Case of *Nicholl*
v. *Nicholl*.

*My notes may be
seen in 16. 5. 1. 2*

Again, in another case, (q) A. devised all his real estate, to the use of the second son of B., (who had then no son,) for the life of such second son, and after his death, or in case he should inherit his paternal estate, by the death of his brother, to his *second* son lawfully to be begotten, and his heirs male, and for default of such issue, to the third, fourth, and other sons of B., successively, in tail-male, and in default of such issue, to the use of the first, second and other sons of C., successively, in tail-male, and for default of such issue, to the use of D., and his heirs for ever : B. had no son living at the time of the testator's death : and the Court of C. B., upon a case out of Chancery, unanimously certified, that the estates should vest in the second son of B., when any such should be, by way of Executory devise ; and that, in order to effectuate the general intent of the testator, such second son would take an estate to him and the heirs male of his body, determinable on the accession of the paternal estate. Here, it will be perceived, the Court disregarded the intention, to exclude the eldest son of the second son, but, in order to carry out the testator's general desire, gave the second son, an estate, which must, if unbarred, descend upon his eldest son, in prejudice of the second son, who was an express object of the testator's bounty. (r)

Case of

So, also, in another case, (s) by settlement on the mar-

(q) *Nicholl v. Nicholl*, 2 Sir W. Bl. 1159.

upon this case, Treatise on "Issue," 64, 65.

(r) See observations of Mr. Prior,

(s) *Robinson v. Hardcastle*, 2 T.

riage of A., with B., estates were conveyed to trustees, after limitations not important to the present purpose, in trust for such child or children of A., on the body of B., as A. should, by deed or will, appoint, and in default of appointment, to the first and other sons of A. and B., in tail, &c.: B. having died in the lifetime of her husband, he devised the settled estates, to the use of his son, J., for life, with remainder, to trustees, to support contingent remainders, with remainder, to the first and other sons of J., in tail, with remainders-over: and the Court of B. R. admitted the doctrine of *cy-prés*, by giving the son, J., an estate-tail, as the limitations in the will, to the sons of J., as purchasers, were clearly void, by reason of his being a person, unborn at the time of the creation of the power.

*Robinson v.
Hardcastle.*

But the case, (t) which is generally considered to have carried the principle of *cy-prés*, to its utmost length, remains yet to be stated. In it, money was, previous to marriage, covenanted to be laid out in the purchase of lands, to be settled, to the use of A., for life, remainder, to B., for life, remainder, to the use of the children of the marriage, subject to such powers limitations and provisions, as A., by deed or will, should appoint, with remainders-over: A. had several children by B., and, by his will, in execution of the power, directed part of a sum of money to be laid out in the purchase of estates, to be conveyed, in trust for his daughter, M., during her life, for her separate use, with remainder, to trustees, to preserve contingent remainders, with remainder, *to the children of the testator's daughter, as tenants in common in tail*, with remainders-over: the question being, as to the validity of the appointment, Lord *Kenyon*, then Master of the Rolls, stopped the argu-

*Case of Pitt v.
Jackson.*

*Money lent by
Devisory 16 M. H. 410*

R. 241; 2 Bro. C. C. 22. Mr. *Butler* considered, (n. to F. C. R. 406,) that the case of *Hopkins v. Hopkins*, 1 West, 606; 1 Atk. 580; afforded support to the doctrine under consideration; but it seems difficult, to discover any solid ground for that conclusion.

And see, as to that case, Prior on "Issue," 64.

(t) *Pitt v. Jackson*, 2 Bro. C. C. 51; as to which, see 1 Jarm. Wills, 263; 2 Sug. Pow. 64, 65. And see *Phelp v. Hay*, App. to 2 Sug. Pow. no. 16.

ment, and determined, that, in order to effectuate the testator's general intention, the daughter must be considered as taking an estate-tail. In this case, it will be observed, the extent of the application of the doctrine was the greater, as the order, in which the children of M. were to take under the appointment, was not strictly coincident with the course of succession under an estate-tail. (u)

But, although the general rule is thus firmly established, by the concurring assent of various judges, both of law and equity, it has been carefully confined within due limits, and has been subjected to various restrictions, which shall now be noticed.

Doctrine presumes an intention, to create a succession of interests, resembling descent of estate-tail.

1. There must be a clear *indicium* of an intention, that the issue of the unborn person should take estates-tail, or should succeed in a mode, analogous to the course in which an estate-tail would descend. (v) Therefore, where there is a limitation, to the issue of an unborn tenant for life, as the parent shall *appoint*, without any express gift, the *cy-prés* doctrine does not apply, and the limitations, *ultra* the life-estate, are bad. This was ruled in a case, (w) before Lord *Rosslyn*, where an estate was settled, pursuant to marriage-articles, upon the husband, for the joint lives of himself and his wife, remainder, on an event which happened, to the wife, for life, remainder, to the children, as the husband should appoint, and in default of appointment, to the children, as tenants in common in tail, with cross-remainders in tail; and the husband, by his will, appointed part of the estate, to one of his sons, for life, and after his decease, *to the children of that son, as he should appoint*: and it was adjudged, that the interests, limited by the appointment to the children of the son, could not, in any respect, take effect, as no estate-tail was given, nor any intention of the kind, expressed, but that the children were

(u) See 2 Jarm. Wills, 263.

(w) *Bristow v. Warde*, 2 Ves. jr.

(v) 2 Sug. Pow. 65. 1 Jarm. Wills, 336.

260, 264; 2 ib. 342, n.

intended to take, either by appointment, or, for want of it, distributively, *per capita*. There was, in fact, no general intent, sufficiently strong, manifested, the furtherance of which would be promoted, by sacrificing the secondary intention, and giving the unborn son an estate-tail.

This rule may seem, in some degree, impeached, by the decision in the case of *Pitt v. Jackson*, before cited; (x) but, it will be observed, that, in that case, although the issue of the appointee for life were to take *concurrently*, they were, nevertheless, to succeed to *estates-tail*, under the appointment. It may, also, appear, that this principle is impugned, by the judgment in the important case of *Mogg v. Mogg*, (y) where there was a devise of estates, to all and every the children and child of the testator's daughter, S. M., (who was *in esse*,) for life, and after the decease of such child and children, to *the lawful issue of such child and children, to hold to such issue, his her and their heirs, as tenants in common*, without survivorship, and in default of such issue, over, to other persons. It was held, by the Court of B. R., on a case from the Court of Chancery, and afterwards, by Sir Thomas Plumer, V. C., on return of the certificate of that Court, that all the children of S. M. took estates-tail, as tenants in common, with *cross-remainders* in tail. In support of this construction, it seems to have been admitted, on the argument, that it would be necessary, to prove, that the issue of the children were intended to take estates-tail, and not estates in fee; it being urged, that the gift was clearly intended, to the children *and their family*: the measure of an estate-tail was, to a man and the heirs of his body; and, therefore, a gift to the family was satisfied by such a gift. It was also argued, that the words, "in default of such issue," in the gift-over, had the effect of cutting down the word, "heirs," in the limitation to the grandchildren, to, "heirs of the body." On the

Cases of *Pitt v. Jackson*, and *Mogg v. Mogg*, in reference to this point.

(x) *Vide supra*, p. 429.

case, 2 Jarm. Wills, 341, 342, n.

(y) 1 Mer. 654. See, as to this

other hand, it was said, that, in all the cases on the doctrine of *cy-prés*, estates-tail were intended for the issue; and that there was no one of them, in which a fee was intended for the issue: that the intention, in that case, was, that the children should take life-estates, with remainder, in fee, to their children: and that the words, "in default of such issue," only referred to children of the children, and could not, therefore, be held, to cut down the estate limited to the grandchildren, to any thing less than a fee-simple. In reply, it was, further, said, that it was clear, the testator used the word, "issue," as descriptive of the descendants of the children; and that the word, "heirs," which he had added, served only to give the devise the character of an inheritance: that those expressions together could not be satisfied, otherwise than by giving the children estates-tail: that the case did not turn upon the doctrine of *cy-prés*, alone; for, independent of that, the case might be decided on those authorities, which professed to establish the general intention of the testator. What the exact ground of the decision, that the children took estates-tail, was, it would not be proper to conjecture; but, certain it is, that the case cannot be deemed an authority for the position, that, under a devise to unborn children, for life, with remainder, to their *issue, as tenants in common in fee*, the children will take estates-tail. On either of two grounds, that alternative is avoided: the Court may have considered, that the word, "heirs," in the gift to the grandchildren, meant, heirs of the body, or that, by the effect of the words, "in default of such issue," introducing the limitation-over, the estates of the issue of the children were cut down to estates-tail; in either of which cases, the decision would be similar to that in *Pitt v. Jackson*: or the adjudication may not have proceeded solely upon the rule of construction, *cy-prés*, but, also, as was maintained in the argument, upon a general regard for the testator's intention, which was, to provide for the family or descendants of the children, and, likewise, (it may be added

an anxiety to give effect to the testator's dispositions, which would have been, in a great part, defeated, by giving the grandchildren estates by purchase.

2. The doctrine of *cy-prés* is not admissible, where there is only a single intent, to create a perpetuity, and not a general intention of providing for all the line of issue, combined with an inconsistent particular intent, in regard to the mode of effecting that object. (2) Thus, where (a) there was a devise, "to A., for life, and after him, to his eldest or to any other son after him, for life, and after them, to as many of his descendants, issue male, as should be heirs of his or their bodies, *down to the tenth generation*;" it was held, that A. took no more than a life-estate, for that here was no general intent, to create an estate-tail, as contradistinguished from the particular intent, to give an estate for life, to the first taker, but a single intent, to create a succession of life-estates to persons not *in esse*, which the law would not allow. So, also, where (b) there was a devise of lands, to trustees, in fee, in trust for A., an infant, for ninety-nine years if he should so long live, and after that term, to his first, second, third, and fourth sons, and the issue male of their bodies, *for the like term of ninety-nine years*, as they should be in seniority of birth, and in default of such issue male in him or them, then, to B., and the issue male of his body, for the like term of ninety-nine years, and in default of such issue male, then, to the right heirs of the devisor; it was held, that A. took an estate for ninety-nine years determinable with his life, and that upon his death, his first son took a like estate, but that the subsequent limitations to A.'s other sons, and to B., and his issue male, were void. Here, it will be observed, was an intention, to limit successive estates for years, to the individuals from time to time answering the description of heirs male, and not a

There must be a general intention to provide for all the issue, and not merely a single intent to create a succession of void estates.

(2) 2 Sug. Pow. 60, n.; 2 Prest. 198; 1 Smith, 390. Abst. 167.

(b) *Somerville v. Lethbridge*, 6 T.

(a) *Seaward v. Willock*, 5 East, R. 213.

general intent, to provide for the lines of issue, by descendible estates, capable of devolution in a due course of succession. Moreover, as the inheritance was partitioned into a variety of terms for years, it would have been impossible, to convert them into one descendible entail, without resorting to an unwarrantably tortuous and strained construction.

Mere circumstance of interests of successive takers being expressly for life, not sufficient to rebut *cy-prés* construction.

From a passage in the judgment of Lord *Ellenborough*, C. J., in the first of the cases just cited, it would appear, as if the circumstance, of the interests of the successive takers *being expressly confined to their lives*, was the ground of the rejection of the *cy-prés* doctrine. "In this case," said the Chief Justice, (c) "the devisor has not used general terms, from whence an intent, to give a *descendible* estate to the issue of the first devisee, may be collected; but has, in express terms, narrowed the estates, which the issue were to take, *to estates for life*; and this, properly speaking, is not a case of a particular and a general intent, both of which cannot be effectuated, and where the one must give way to the other, but a case of single intent, to create a succession of *estates for life*, not warranted by any law."

But, notwithstanding the inference derivable from these observations, it is conceived, that the principle of the *cy-prés* construction is no less applicable to a case, where there is an apparent intention, to give each successive taker, an estate for his life only, than, where the property is, in direct terms, limited to the issue of an unborn person, and the heirs of their bodies, so as to create an express estate-tail. The real intent is, in both cases, the same,—*viz.*, that there should be a succession of interests in the line of persons, who would be inheritable to an estate-tail, either general or special. The law declares, that can be only effected, by creating an estate, which shall, in its own nature, be descendible to the persons intended successively to take. What avails it, then,

(c) 5 East, 207. And see *Hayes' Principles*, 50.

that the interest of each person, included in this line of takers, is, in terms, confined to his life, if the paramount intention be thereby frustrated? And, in what consists the difference, as regards the application of the *cy-prés* doctrine, between such a case, and that of a limitation of *descendible* interests to issue of a person unborn, which are intended to devolve on successive generations? It seems undeniable, that both cases alike admit of and require the application of the rule in question. (d)

Whatever force may be attributable to the circumstance under consideration, in the limitation of legal estates, there can be little doubt, that, in a case of *executory trusts* in Chancery, the carrying into effect of which is subject to the control of the Court, limitations of the character just mentioned would fall within the general doctrine of *cy-prés*, and would be executed, by the creation of an estate-tail, in favor of the first unborn person, supposing, the whole line of issue of such person were intended to be comprehended in the limitations; which cannot be predicated of the before-stated case of *Seaward v. Willock*. (e)

Cy-prés construction applied in case of executory trusts, although limitations seemingly designed to create a perpetuity only.

3. The doctrine of *cy-prés* is not applicable to limitations of *personal* estate. The reason, on which that doctrine is grounded, is, as has been already stated, the giving effect to the supposed primary intention of the testator, to provide for the general line of issue, who cannot, by the rules of law, take otherwise than derivatively through their ancestor, but, to some of whom, the testator has attempted to limit interests, originally and independently. It is obvious, therefore, that, since personalty is not capable of transmission by entail, but always vests absolutely in any person, to whom it is limited, by words which would create an estate-tail in realty, the application of the principles of the doctrine in question, to limitations of personal estate, would be arbitrary and baseless.

Cy-prés doctrine not extended to limitations of personalty.

(d) See *Mortimer v. West*, 2 Sim. 274; stated, *infra*, p. 443.

(e) See 2 Sug. Pow. 60, n.

And, consequently, in a well-known case, (*f*) where a trust fund was appointed, under a power, to R. D., who was not living at the time of the creation of the power, for life, and after his decease, to and amongst his children, in equal shares; with an ultimate limitation, to R. D., absolutely, in default of children: it was held, that the limitations could not be executed, *cy-prés*, for any supposed general intention could only be effectuated, by giving the fund to the appointee, absolutely, and, then, it would not go in a course of descent, but would pass to his executors, and be liable to his debts.

Case of *Monkhouse v. Monkhouse* considered, as to this point.

The integrity of this exception from the doctrine, may, on a superficial view, seem to be assailed, by the decision in the recent case of *Monkhouse v. Monkhouse*, (*g*) before V. C. *Shadwell*. In that case, T. A. bequeathed personalty, to J. A. M., during his life, and after his death, to his eldest son, during his life, and *to remain entailed on the eldest son descended from the same J. A. M., and his posterity, from one generation to another*, for ever; but in case of death or want of issue from the said J. A. M., over: J. A. M. afterwards died without ever having had any issue. The V. C., after stating the limitations in the will, observed, that, "*inasmuch as J. A. M. had no eldest son at the death of the testator, these words must be construed, so as to make the sons tenants in tail*, in remainder expectant upon the decease of their father." And, again,—“The bequest must be read, as if he had given the property, to J. A. M., for life, with remainder, to his first and other sons in tail.” Supposing, no words had been employed by the testator, which could have created an estate-tail in realty, unassisted by the doctrine of *cy-prés*, this decision would, clearly, have amounted to a denial of any distinction, between gifts of real and personal estate, in regard to the application of

(*f*) *Routledge v. Dorril*, 2 Ves. jr. 357. (*g*) 3 Sim. 119.

that doctrine. But, it is conceived, that, as well the limitation itself, as the words introducing the gift-over, would have abundantly sufficed for the creation of an estate-tail, without regard to the circumstances of any of the devisees, or the application of any doctrine of construction, peculiarly induced by them. And, that being the case, the reported expressions of the learned judge, which apparently went to rest the construction, adopted by him, on the accidental circumstance, of the devisee for life not having any son born in the testator's lifetime, must be understood, as merely referring to the choice which was to be made, of some person, as first *quasi-tenant* in tail; it being evident, that, had there been a son *in esse*, compliance with the testator's *intention* would have required, that he should be made tenant for life only, with an ulterior gift to his issue, by purchase, although the *expressions in the will* abundantly warranted the construction of his taking a *quasi-estate-tail*. It was not a case, in which the words of the gift rendered it necessary, that the son of the first taker should be confined to a life-interest, and in which, therefore, any enlargement of that interest, must have been grounded, solely, on the construction, *cy-prés*. (A)

But, it should seem, that the rule, restricting the application of the doctrine of *cy-prés*, to devises of real estate, does not prevent its operating upon limitations of personalty, when, in a will containing limitations of realty, to which the rule of construction in question is applied, there is, also, a bequest of personal estate, upon the same trusts as are declared of the real estate, either conjoined with the former, or referential to it. (i) In such a case, the limitations of the personal property are not operated upon *directly* by the *cy-prés* doctrine; just as, in the analogous instance of a bequest of chattels, in a manner, which, as regards realty, would create an estate-tail, under the *Rule in Shelley's case*,

But rule applied, in case of conjoint disposition of real and personal estate.

(A) See Prior on "Issue," 83.

(i) Ib. 66, 174.

and which, by the referential construction of similar gifts of personalty, vests the absolute interest in the person, who would be tenant in-tail, in the former case. The chattels are to be held upon the same trusts as those previously limited of the realty: those trusts are subject to a peculiar construction by the law (which, it is true, gives them an operation, in some degree, diverse from that intended): and the limitations of the personal estate must, therefore, take effect, in the same manner, as if the gifts of the realty had *actually* corresponded with their *virtual* operation, under the construction put upon them by the law. It follows, consequently, that, whenever, under the doctrine of *cy-prés*, an estate-tail in realty would vest in an unborn child, the absolute interest in personal property bequeathed upon the like trusts, also vests in that child.

Case of *Mogg v. Mogg* considered, as to this point.

Some such principle as this, it is conceived, influenced the decision, upon the construction of a bequest of leasehold property, in the above-noticed case of *Mogg v. Mogg*, (j) where the Court, having (as it seems) applied the construction of *cy-prés*, to various limitations of realty, extended it to a bequest of personalty, upon trusts declared in *exactly similar words*, although not, it is true, by *reference*, merely, to the previous gifts. It was argued, in support of the absolute interest of the personalty vesting in the parties made tenants in tail under the doctrine of *cy-prés*, that such a construction was necessary, in order to effect the general plan and intention of the will: and that, although the doctrine in question did not strictly hold, the words used in the limitations of the real and personal estate were the same, and, therefore, the maxim, *noscitur a sociis*, applied. On the other hand, it was said, that the object of the testator was, that the *issue of the children* should take the absolute interest of the personalty, it being given to them, their executors and administrators: and that it was impossible, to enlarge the gift to the

(j) 1 Mer. 654. In addition to 274; and Prior on "Issue," 66. which, see *Mortimer v. West*, 2 Sim.

children, on account of the limitation to their issue, because, giving the absolute interest to the parent, in a chattel, was not doing anything for the issue. It cannot be collected, on what precise ground, the construction, that the parties, made tenants in tail of the realty, took the absolute interest of the personalty, was intended to rest. We have seen, (*k*) that, even in regard to the limitations of the real estate, the decision adopted, is not, necessarily and exclusively, referrible to the doctrine of *cy-prés* : and, in respect of the personalty, it may, perhaps, not improperly, be considered, as the compound result of the influence of the *cy-prés* doctrine, a regard for the testator's general intention, with an anxiety to support his dispositions, as far as possible, and the rule, *non-citur a sociis*. It is obvious, therefore, that a decision, affected by such considerations, can operate no very important infringement of the rule, that the construction, *cy-prés*, is not applicable to limitations of personalty, even though it be not wholly resolvable into the principle of the referential construction, before alluded to, and which does not seem open to any just exception.

But there is another reflection, affecting the decision in *Mogg v. Mogg*, and, at the same time, of general importance, in regard to the limitations of personalty under consideration. It is, that, where the gifts to the parent and issue are followed by a *general limitation-over, on failure of issue*, either of the parent, or the first generation of issue, as the limitation to the remote class of issue, as purchasers, is, *ex hypothesi*, bad, it must be considered, as struck out of the limitations, leaving only a gift to the ancestor, or first class of issue, for life, with a limitation-over, on failure of issue of either ; which, under the general rule of law, formerly considered, will operate to vest the absolute interest, in the person or class, on failure of whose issue, the ultimate gift is to take effect. (*l*) This reflection, though not *proper* to

If *cy-prés* doctrine not applicable, gift to issue may be treated as obliterated, and first taker have absolute interest, by force of gift-over.

(*k*) *Vide supra*, pp. 431, 432.

(*l*) See Prior on "Issue," 178.

the construction of *cy-prés*, will be found to be ultimately connected with the question, of its applicability to limitations of personalty, on account of the frequency of limitations—over, on a general failure of issue, following gifts to persons and classes, and their issue.

Construction of
cy-prés not
applied to
limitations in
deeds.

4. A further restriction of the doctrine of *cy-prés*, is, that it is not applicable to limitations, either of real or personal estate, in *deeds*. It is, in fact, an offshoot of that general system of indulgence and laxity of construction, as respects wills, which has long obtained in our Courts, both of law and equity, but which has not been suffered to have place, in regard to the interpretation of, and giving effect to, instruments *inter vivos*. And, accordingly, where (*m*) a power of appointment, among the children of a marriage, was executed, by an appointment, by deed, to a daughter, for life, remainder, to the eldest son, for life, remainder, to trustees, to preserve contingent remainders, remainder, to the first and other sons, in tail, &c., remainder, to the daughter, in fee; it was held, by the Court of B. R., on a case from Chancery, that all the limitations, subsequent to that to the eldest son for life, were void, as being an excess beyond the power; and that such an appointment, being by deed, could not be construed, *cy-prés*, so as to give the son an estate-tail, as might have been the case, if the appointment had been by will. And Lord *Eldon*, also, in the same case, when before him, (*n*) observed, that the doctrine had not been applied to limitations in deeds. (*o*)

(*m*) *Brudenell v. Elwes*, 1 East, 442. And see *Adams v. Adams*, Cowp. 651.

(*n*) 7 Ves. jr. 390.

(*o*) Mr. *Preston*, (2 Essay on Abst. 166, 167,) seems to incline to the opinion, that the doctrine of *cy-prés* is admissible in the construction of limitations *by way of trust*, in deeds, although not, of similar limitations of

legal estates; but no authority is adduced for this position: and, as the opinion is hesitatingly expressed, and the writer has not found it confirmed by that of any other author, or by any decided case, it is not deemed necessary, to do more, than, thus incidentally, allude to the apparent impression of the eminent real property lawyer in question.

5. It is to be further observed, that the rule of *cy-prés* cannot be applied, unless the person, or class, who, in case of its application, would take an estate-tail, be entitled to a *freehold* estate or estates for life. (*p*) An estate for years determinable with the life or lives will not suffice, as a foundation for an estate-tail: for though the Courts, in the case of an express gift for life, so far disregard the particular intention of the testator, as to convert it into a limitation of an estate-tail, yet there is no repugnancy between the nature of the estate, on which the enlargement is founded, and that, into which it is enlarged. When an estate for years, however, is given, there is no interest, susceptible of enlargement into a descendible estate,—nothing, on which the construction of an estate-tail can proceed. In such a case, therefore, the limitations, subsequent to the term, are irremediably void, and the presumed general intention cannot be effectuated.

Person or class to be made tenant or tenants in tail must have a *freehold* life-interest.

6. A question seems to exist, as to the estate which is to be enlarged under the application of the doctrine of *cy-prés*: whether those members of the class of issue designated, who come *in esse* in the testator's lifetime, may be restricted to life-estates, with remainders in tail, to their children, while the other unborn members of the same generation of issue take immediate estates-tail; or, whether the interest of the *first takers*, although born in the testator's lifetime, is that, which is to be enlarged into an estate-tail. In other words, the question is, whether the wishes of the testator, are to be complied with, as far as the Rule against Perpetuities will permit; or, whether, when a necessity for the application of the *cy-prés* doctrine exists, it is to be applied, to the interests of *all* persons possibly falling within its range, irrespectively of the circumstance, of some of those persons being born, so as to admit of express gifts being limited to their issue, by purchase.

With what class of issue, the estate-tail is to commence.

(*p*) See *Somerville v. Lethbridge*, B. & Ald. 801; 5 Taunt. 393.
6 T. R. 213; *Beard v. Westcott*, 5

If regard be had to principle and analogy, it does not seem difficult, to arrive at a conclusion upon this question. It has been before seen, that every limitation by will must be such, as, *according to the state of events at its date*, can be substantiated under the Rule against Perpetuities; and that the whole limitation fails, if remoteness attach to any of the objects of it. In the supposed case, therefore, it is clear, that, independently of the construction of *cy-prés*, the entire gift, subsequent to that, which is made to the first class of *un-born* issue, or which *may* possibly embrace such after-born issue, is void: none of the objects of it can claim, although they may be born, or become capable of taking, within the testator's lifetime. Now, the rule of *cy-prés* effects no change in the ordinary rules upon the question of remoteness. It consolidates the remote gifts, and the prior valid one, into a limitation of an estate, whose course of devolution answers to the general intention of the testator, as to the parties to succeed, and the mode of succession. And the rule does it upon this principle: that those persons, who, by the ordinary rules of remoteness, cannot be made tenants for life, with remainders, to their issue, are to be the persons, whose estate is to be enlarged. In the case of a gift, by will, to A., for life, with remainder, to his children, for life, with remainder, to their children, in tail, we have seen, that the ulterior limitation is void; and *that*, although A. may die in the testator's lifetime, and, so, the remoter issue be made capable of taking by express gift, if the testator avail himself of the change of events. Obviously, therefore, the rule of *cy-prés* must be applied to the limitations, *as they originally stand*; that construction being the mode, whereby to remedy the invalidity of the limitations, which arises from the rule of law, requiring them to be valid within the Rule against Perpetuities, *in their original formation, and according to the state of events at the date of the will.*

Case of This view is, apparently, supported by several authorities

which it will be proper to notice. In *Wollen v. Andrewes*, (r) *Wollen v. Andrewes.* there was a devise, to a trustee, in trust, to permit the testator's six children to receive the rents of the property, for their lives, and after their respective deceases, to permit *the children of the son or daughter dying*, to receive the rents of his or her sixth share, in equal shares and proportions; *and, so, in like manner, from children to children*: in case either of the testator's children should die without leaving issue, the rents belonging to the child so dying, to go to the survivor or survivors. It does not appear, whether any of the children had issue, at the time of the testator's death. It was held by the Court of C. B., that the *testator's children took estates-tail*. In delivering the judgment of the Court, *Best*, C. J., remarked, as follows: (s) —“On the face of the will, the testator has given only an estate for life, to the grandchildren, but we are of opinion, that, by the operation of subsequent words, the six children took estates-tail in the premises, because the testator goes on to attempt that which is impossible,—to give an estate for life to unborn grandchildren; he is not allowed by law, so to advance towards the creation of a perpetuity: but we must do that which will approach the nearest to his intentions, and, therefore, *the second limitation must be construed as an enlargement of the first estate for life*.” Here, it is manifest, that though it would have been perfectly allowable, as far as regards any question of remoteness, to have vested estates-tail in the *children of the testator's children*, leaving the estates of the children, as limited by the will; the enlargement of the interests of the first takers must be referred to a general rule, such as that here maintained; which was applied incorrectly, in consequence of a misconception as to the legality of gifts of life-interests to unborn persons.

In *Mortimer v. West*, (t) there was a devise, to A., B., C., and D., natural children of the testator, by M. D., share and

*Case of
Mortimer v.
West.*

(r) 2 Bing. 126.

(t) 2 Sim. 274.

(s) 2 Bing. 130.

share alike, for their lives, and after the decease of every of the said children, leaving issue, the share of such child so dying, to go and be divided equally between his or her children, whether sons or daughters, *for life*, share and share alike, if more than one, and if but one, then, the whole share to such only child, for life, and so, to be continued and distributed in a descending line, *per stirpes*, from issue to issue, *for life*, so long as any issue should be living, descending from the said M. D.; the children of the parent dying to take such parent's share equally between them, in all cases of decease: in case any of the said children of M. D., or their respective issue, should die, leaving no issue, then, the share of him or her so dying, to go to the surviving brothers and sisters, for their lives, and proportionably amongst the issue of any, who should be dead; and for default of such brother or sister, or their issue, then, as in the will mentioned: and in default of any issue, descending and proceeding from the children of M. D., over. It would seem, that none of the children of M. D., had issue at the time of the testator's death. It was held by Sir *L. Shadwell*, V. C., that A., B., C., and D., took estates-tail; although it had been argued, on behalf of the children of one of those persons, that, by force of the decision in *Humberston v. Humberston*, the first legatees must be confined to the life-interests, intended them by the will, and that their children should take estates-tail: but his honor observed, that the decision in the case cited was not applicable, the trusts, there, being executory, and being, therefore, carried out, to the utmost extent allowed by law.

Case of Again, in the case of *Brooke v. Turner*, (u) a testator

(u) 2 Bing. N. C. 422. It has been thought, (see Prior on "Issue," 156, 157,) that this and the preceding cases proceeded chiefly on the evidence of intention, afforded by the gift-over, in each, in default of issue of the person made tenant in tail. But it is not easy to see, what pre-

sumption of intention can be collected from the limitation-over, which is not afforded, in a superior degree, by the previous express gift. In all cases, where the principle of *cy-prés* applies, the testator is supposed to intend, and shows that he intends, a succession, in infinitum, by the issue of a particu-

devised lands, to trustees, in fee, in trust for his wife, for life, and after her decease, to the use of his children, F., T., and E., *for their lives*, in equal shares, and to the *issue of their respective bodies*, for their respective *life only*, in equal shares, for ever; and in case of the death of any or either of his said children without issue, then, upon trust for the survivors or survivor of them, in equal shares, for life only; and in case there should be only one child then living, then, upon trust for such only child, for life only, and for the issue of such only child, for life, in equal shares; and if but one issue of such child, then, to such only child's issue, for life only, and the heir of his or her body, for ever; but, in case there should not be any issue of such child, or the child of such child, remainder, over: either of the testator's children who should marry, to have power, to make a settlement of his share; such settlement, to be for the lives of the parties, and the lives of their issue, with remainder-over, in tail: and the testator desired, that his children should keep the property in his family, so long as there should be found one of them living. By a codicil, the testator, noticing the dispositions in his will, devised the property, after the decease of his wife, to the trustees, in fee, for the use of his three children, as tenants in common, for the term of ninety-nine years, if they, or either of them, should so long live, and, subject thereto, to the trustees, to preserve the contingent estates; and the uses (subject to those declared by the codicil) expressed in the will, as far as the rules of law would permit, were to be carried into execution. On a case out of Chancery, upon the construction of this will and codicil, it was argued, on the one side, that, as the testator's desire was, to create a perpetuity, among his children and their issue, a construction must be put upon the will, which would nearest approach the testator's intention; and that, in order to secure the issue of each of the testator's children, a

*Brooke v.
Turner.*

lar person or class : and what strength	the terms of the limitation-over, which
does that circumstance derive, from	itself can only raise an inference ?

share, those children must take estates-tail, (v) in remainder expectant on the estates for ninety-nine years created by the codicil, and the estate to support contingent remainders; and that the paramount intention of the testator must prevail over incompatible subordinate intention: and, on the other hand, it was contended, that the children took estates for ninety-nine years determinable with their lives, the freehold being vested in the trustees during the term, with remainders *in tail*, to the *issue of the three children*. The certificate of the Court of C. B. was to the effect, that the testator's three children took estates for the term of ninety-nine years, if they should respectively so long live, with remainder, to the trustees, for the respective lives of the three children, in trust to preserve contingent remainders, with remainder, to those children, as tenants in common in tail-general, with cross-remainders between them in tail-general.

Case of *Trash*
v. *Wood*.

Another authority, of the same character, is the recent case of *Trash v. Wood*, (w) where a testator devised copyhold property, to trustees, upon trust, subject to certain yearly charges, to pay the residue of the rents and profits, as follows:—"To my grandson, J. T., for his life, and after his decease, to pay the residue as aforesaid, unto his children, and so on, for ever; and for want of children lawfully begotten, to my three daughters, for the term of their natural lives, equally between them, and from and after their decease, to pay the residue, unto all my grandchildren, equally between them, and so on, to their children, for ever." It does not appear, whether there was any gift-over on default of issue of all the testator's children. On a bill, filed by the youngest son of J. T., claiming to be customary heir of the latter, for a declaration of his title to the property devised, it was contended, that J. T. took an estate-

(v) This, clearly, was not necessary: the children were (from the nature of the case,) in case, and their

issue might legally take by purchase.

(w) 4 Myl. & Cr. 324.

tail; that being, as was said, the only construction, by which, effect could be given to the manifest intent of the testatrix. On the other hand, it was urged, that J. T. took no more than a life-estate in the devised copyhold, and that, upon his death, all his children, who were then living, became entitled to a life-interest. Lord Chancellor *Cottenham*, after observing, that the words, "for want of children," in the ulterior gift, must mean, for want of issue, said, the testatrix's object was, that children's children for ever should enjoy the property in perpetual succession; and she made no gift-over, whilst any such were left: and that there was no way of effecting that purpose, but by giving an estate-tail to J. T.

In opposition to the doctrine apparently established by these authorities, has been urged, the decision in *Goodtitle d. Cross v. Woodhull*,^(x) where there was a devise, to the testator's eldest son, J. C., for life, and after his decease, the property to descend to his male children, (if he had any,) for their natural lives only, and to the male children descending from them, and upon their decease or failure, then, the property to fall to L. C., and the heirs male of his body, for the same term of life, and upon the same terms as the testator intended for his son, J., and his male children, and in case of his (L.'s) and his male children, their failure, then, the property to descend to T. C., and his male children, for the same term of his and their life, and upon the same terms. Then followed a gift, to the daughters of J. C., L. C., and T. C., and an ultimate gift-over, on failure of the testator's children, and their issue. J. C. and L. C. died, without ever having had issue, but they both had suffered recoveries. T. C. died, leaving issue, two sons, by whom ejectment was brought. It was decided, that J. C. and L. C., respectively, took for life only; and judgment was, accordingly, given, for the parties claiming under the ulterior gift. Upon this decision, it has been observed,^(y) that,—“In this case, it was clear, that all the male descend-

Case of Goodtitle d. Cross v. Woodhull.

(x) Willcs, 592.

(y) Prior on "Issue," 62.

ants of J. C. were to take for life successively, before L. C., and those of L. C., before T. C.; yet the decision was, that J. C. and L. C. took for life only. The ground of the decision, it is apprehended, was, that the devolution of the property, to all the descendants of J. C. and L. C., might be secured, by giving the sons of J. C. and L. C., estates-tail, instead of their parents; and that, therefore, the testator's intention, of giving successive life-estates, should also be effectuated, as far as was consistent with the Rule of Law against Perpetuities."

Observations
upon *Goodtitle*
d. *Cross v.*
Woodhull.

Now, it is admitted, that, if the testator evinced an intention of "giving successive life-estates," to all the issue of his three children, and, thereby, brought his dispositions within the principle of the *cy-prés* doctrine, the decision, that those children took only life-estates, is inconsistent with the rule deduced from the authorities before cited. But, it is conceived, that the case in question has no real connexion with the rule of *cy-prés*; and that the decision, at which the Court arrived, was the only one consistent with established rules of construction. The case seems to have been, simply, one of a devise for life, with remainder, for life, with remainder, to the male issue of the last devisee for life; which two latter limitations coalesced under the *Rule in Shelley's case*. The gifts, to the male issue of the children, were expressed in terms, proper for creating estates-tail-male: there was nothing in the will, to confine the interests of the successive descendants, to their lives: and there was, consequently, no ground for the application of the construction of *cy-prés*. An attention to the observations of Lord C. J. *Willes*, on delivering judgment, will immediately shew this. "We are of opinion," observed that eminent judge, (z) "that J. C. took only an estate for life; for which, I shall cite only three or four cases. *Archer's case*, 1 Co. 66; a devise to R. A., for life, and to his next heir male, and the heirs

(z) *Willes*, 594.

male of the body of such heir male ; and it was holden, to be only an estate for life. The case of *Clerk v. Day*, Cro. Eliz. 313, was exactly the same. Then in *Wild's case*, 6 Co. 17, where it was held, that if there be a devise to A., and his children, and there be no children, it is an estate-tail, of necessity, because it is a devise to the children by words *de præ-senti* : but a devise to A., and after his decease, to his children ; it is only an estate for life. Again, in *Lodington v. Kime*, Salk. 224, there was a devise to A., for life, without impeachment of waste, and in case he have any issue male, then, to such issue male, and his heirs for ever ; and it was held, that *issue* must be taken as *nomen singulare*, because of the devise to the heirs of such issue. So, in Rol. Abr. 837, pl. 13, a devise to his eldest son, for life, and after his decease, to the sons of his body ; it was holden, to be only an estate for life, by reason of the words, *non aliter*. And, lastly, in the case of *Ginger v. White*, Willes, 348, there was a devise to A., for life, then, to the children of A., successively, and their heirs, and if A. die without issue, then, to B. in fee ; held, that A. took only an estate for life. With regard to the objection, as to the absurdities that will follow ; it is not to be supposed, that the devisor knew them : but it is plain, that he had it in his contemplation, whether they should have estates for life, or in tail."

These observations (all that were delivered on the point of construction,) conclusively demonstrate, that the decision was far removed from any connexion with the *cy-prés* doctrine, and that it rested upon the plain and intelligible ground, afforded by the superaddition of words of inheritable succession, to the gift to the children of the testator's children ; which, as between the first and second generations of issue, necessitated the construction of the latter taking by purchase.

But, even if there were no observable difference, or intelligible ground of distinction, between the cases which have been noticed, little practical objection could exist, to the

alternative, of considering the decision in *Goodtitle v. Woodhull* as overruled by the later adjudications, as it occurred at a comparatively distant period, when the laws against remoteness were unsettled, and their principles (if any) imperfectly understood, and when the many distinctions and refinements, now well established in reference to those laws, were seldom even presented to judicial consideration, or subjected to forensic inquiry and discussion.

Case of
Humberston v.
Humberston.

It next occurs, to notice the case of *Humberston v. Humberston*, (a) in connexion with the question here considered. In that case, it will be remembered, M. H. devised lands, to a corporation, in trust to convey them, to his godson, M. H., for life, and upon his death, to his first son, for life, and so, to the first son of that first son, for life, &c., and if no issue male of the first son, then, to the second son of M. H., the devisee, for life, and his issue, in like manner, with remainders-over, to various other members of the H. family, and their sons, &c., for life, without any disposition of the fee. On a bill filed by the first devisee, for execution of the trusts of the will, Lord Chancellor *Couper* said, that, so far as the testator's intention was consistent with the rules of law, it ought to be complied with; and he, accordingly, directed, that all the sons of the H.'s, that were already born, should take estates for their lives; but that, where the limitation was to the first son unborn, there, the estate to such unborn son should be in tail-male. It does not clearly appear, from either the observations of the Lord Chancellor, or the statement of the decree, in the report, what period was referred to, in the expression, *sons already born*; but, it must be assumed, that the Court intended, sons, *born at the time of the testator's death*, to take estates for life, and not, all such as might be living at the date of the settlement.

Observations
upon *Humber-*
ston v.
Humberston.

This decision, obviously, proceeded upon the principle, that the limitations, being executory, might be carried out

(a) 1 P. Wms. 332; 2 Vern. 737; Pr. Cha. 453; 1 Eq. Ca. 207, pl. 8.

in accordance with the testator's intention, as far as was allowable by the rules of law; and the case has always formed an authority for that mode of proceeding, in regard to executory trusts. It is idle to affirm, that the fact of the trust being executory cannot affect the question, when the giving effect to limitations, which, if executed, would be void for remoteness, on account of their incomplete and indeterminate character, is a matter of constant observation. It is difficult, therefore, to discover the weight of an argument, which has been urged against the distinction between trusts executed and executory, of the following character. "In cases of executory trusts," observes Mr. *Prior*, (b) "the Courts consider, that the testator is, as it were, giving instructions for a conveyance, and uses a shorter and more popular way of expressing himself, than he would have done, if he had been actually declaring executed trusts; and, therefore, they hold, that general expressions are used by him in a particular sense; as, for instance, 'heirs of the body,' is construed, as if it were, first and other sons. According to the Vice-Chancellor, however," (alluding to the distinction taken by Sir *L. Shadwell*, in the case of *Mortimer v. West*, between it and *Humberston v. Humberston*,) "they are called upon to do just the contrary, in these *cy-prés* cases: they are to infer, that the testator has used more particular and precise expressions, in directing a conveyance to be made, than he intended to be inserted in the actual conveyance; a position very difficult to be maintained." With all respect for this gentleman's opinion, it is conceived, that the distinctive character of the practice of Courts of equity, in carrying out executory trusts, is, the giving effect to them, as far as possible, according to the intentions of their author. His expressions may fall short of, or exceed, his legal powers: but his intention is regarded in both alike; and the duty of a Court of equity is, in each,

(b) Treatise on "Issue," 60, 61.

the same. He wishes his property to be settled, as strictly as possible : in one case, he uses general words of succession, which would fail of effecting his purpose ; and Chancery supplies the defect : in another, he aspires to an excessive posthumous control over his property ; and Equity sets aside the invalid portion of his dispositive scheme, but gives effect, at the same time, to whatever may be substantiated. Moreover, the learned writer's argument directs itself, equally, against all decisions that have ever been pronounced, whereby effect has been given to trusts executory, which, if executed, would have been too remote. Until these cases have been over-ruled, therefore, there can be little impropriety, in affirming the justness of the distinction, between trusts executory and trusts executed, in respect to the particular point of the application of the *cy-prés* doctrine under consideration.

Case of
Vanderplank
v. King.

*More explanation & details
16 Feb. 1861/410*

Since the preceding observations were written, a case has been decided, which apparently supports the opinion, that the class of children or issue who first take is not that with which the estate-tail should commence, when such children or issue come *in esse* in the testator's lifetime. The case is that of *Vanderplank v. King*, (c) where there was a devise, to the testator's daughter, J. K., for life, and after her decease, to all and every the child or children of her body, male or female, and their assigns, for their lives, and after the decease of any such child or children, to the child and children of the body and bodies of all and every such child or children of the testator's said daughter, male or female, to be begotten, and the heirs of his and their respective body and bodies ; such children to take in equal shares, as tenants in common, and not as joint tenants ; and in case of the death of any child of the testator's said daughter, and failure of issue of his or her body, then, the share or shares which so failed, to go to the survivor or survivors of such

(c) *Ex relatione* ; not yet reported.

children, as tenants in common, if more than one; and in case of the death of all such children without issue, over: most of the children of J. K. were born in the testator's lifetime; but the birth of one of them did not take place till after his decease: and the principal question seems to have been, whether the children of the daughter took estates for life, or in tail. It was held by Sir *James Wigram*, V. C., that all the children of the testator's daughter, J. K., born in the lifetime of the testator, took estates for life, with remainder, to their children, in tail; but that the child, born after the death of the testator, took an estate-tail, by the doctrine of *cy-prés*; and, further, that the children took cross-remainders between them. At present, it can only be observed of this decision, that, if it shall prove to have proceeded, broadly and intelligibly, upon a consideration of the nature and operation of the *cy-prés* construction, it should seem to be at variance with some, at least, of the authorities previously cited; and that it must remain for future adjudication to determine, how far the doctrine, apparently sanctioned by it, accords with strict principles of law, as compared with that supported by the cases above adduced.

7. It has long been a very general opinion, that the doctrine of *cy-prés* has been carried out, to the fullest extent warranted by the principles on which it is grounded. Thus, Lord *Kenyon* himself, who decided the case of *Pitt v. Jackson*, observed, (*d*) many years afterwards, that it went to the very outside of the rules of construction, and to the utmost verge of the law. And Lord *Eldon*, also, remarked, (*e*) that, in the *cy-prés* doctrine, it was not proper, to go one step further; as the cases, in order to serve the general intent, and the particular intent, had destroyed both. Mr. *Butler* has, also, observed, (*f*) that, in practice, the doctrine should not be acted upon without a considerable degree of attention;

Doctrine of
cy-prés not to
be extended.

(*d*) 1 East, 442.

(*f*) Note to F. C. R. 208.

(*e*) 7 Ves. jr. 390.

while Sir *Edward Sugden* has remarked, (g) that it appears to have been carried too far. The concurrence of authorities, such as these, in the opinion, that the construction, *cy-prés*, is not to be, indiscriminately and unguardedly, resorted to, renders it unnecessary, here to prescribe further caution, in the application of the doctrine; in order that, as Lord *Eldon* remarked, while endeavouring to subserve the general intention, that, as well as the particular, be not defeated. (h)

(g) 2 *Seg. Pow.* 60. And see 2 *Jarm. Wills*, 342, n.

(h) It is observable, that a doctrine, much resembling that of *cy-prés*, was not unknown to the earlier sages of the law. See *Co. Litt.* 219. But that doctrine had reference to a par-

tial failure of disposition, by reason of a *change of events*, before the period of its being completely effected; whereas, the modern rule contemplates, solely, such an imperfection, as arising in the operation of inflexible *principles of law*.

CHAPTER XVII.

OF THE RULE AGAINST PERPETUITIES, AS IT AFFECTS LIMITATIONS TO CLASSES OR ASSOCIATIONS OF PERSONS.

FOREMOST among the various kinds of dispositions, which call for the application of the Rule for the prevention of Perpetuities, are to be placed, limitations to a class or associated number of individuals, either answering a particular description, or specifically named. These gifts are, for the most part, of the nature, either, of Executory devises and bequests, and Springing and Shifting Uses, (in any of their various modifications,) or of Trusts, declared in deeds, of personal estate, analogous to those limitations.

To exemplify this class of limitations :—Suppose, a testator bequeaths personalty, to A., for life, and after his decease, to such of the children of A., as shall attain twenty-five. The question being, whether this Executory limitation to the children is, or is not, too remote, it is to be inquired, whether, in the very nature of the limitation, that rule of law is satisfied, which requires, that every future interest in property be so limited, as that it must necessarily vest, or fail of effect, within the space of one or more life or lives in being, and twenty-one years. And the answer to this inquiry being, that A. may have a child, born but just before, or not until after, his decease, and who could not, therefore, attain the specified age, within twenty-one years from the expiration of a life in being, (*viz.*, that of A.,) but who, nevertheless, is included in the class entitled under the executory gift, such gift is void, as possibly postponing the vesting of the future interests, for too remote a period.

Illustration of the species of limitations to be considered.

And it is a consequence of the rule, which denies the liberty of looking at actual events, in considering the validity of Executory limitations, (i) that, since the attainment of the required ages, by the children, is not confined to the period allowed by law, no regard can be had, to the circumstance, of *some* of the children acquiring the capacity of taking, within the proper time, or, even, of such being the case, with respect to *all* the children; but the gift is absolutely void, to the same extent, as if it had actually happened, that no one child had become entitled, within the period of legal remoteness. The gift is, in a word, either, wholly good, or, wholly void: to be valid, it must be provided, that the children, who are to take, by attaining twenty-five, must attain that age, within twenty-one years from the death of A.; and in such case, they who answer the required description will take the *whole* property bequeathed: without such restriction, the gift will be entirely bad, whatever be the course of subsequent events.

This general property, then, of limitations to a class of persons, being remembered, it is to be ascertained, how the different species of these gifts stand affected, by the practical application of the provisions of the Rule against Perpetuities.

Limitation to children of person *in esse*, to vest at age greater than twenty-one, bad.

1. The preceding observations will have prepared the way for the general rule, that every limitation, whether it be of an interest *in futuro*, or, whether it operate to divest prior interests, or, whether it be a simple gift expectant on a prior partial interest, which is made to the children of a person *in esse*, but which is not to vest, *until after* their attainment of their ages of twenty-one years, (however small the additional period,) is absolutely void. (k) The grounds of this general conclusion have been already stated.

Same, although

2. Upon the same principle, if a living person is associated

(i) *Vide supra*, pp. 170, 171.

(k) *Leake v. Robinson*, 2 Mer. 363. *Bull v. Pritchard*, 1 Russ. 213. *Vawardry v. Geddes*, 1 Russ. & My.

203. *Judd v. Judd*, 3 Sim. 525. *Porter v. Fox*, 6 Sim. 485. *Dodd v. Wake*, 8 Sim. 616. *Newman v. Newman*, 10 Sim. 51.

with the general class, (as if a child of the person *in esse*, person in existence associated with the unascertained class. who is actually born, be specifically named,) and the vesting of his interest depends upon the same (remote) event, as that which is to give effect to the interests of the members of the unascertained class, the whole gift will be void, as in the case first supposed. (l) There can be no separation of interests which are blended in the limitation; and which must either stand or fall together. Moreover, the *practical* impediments to a contrary doctrine are insurmountable. Is the living person to take the *whole* fund or property? Or, if not the whole, what distributive share?—and how is it to be estimated, seeing that the relative proportion of one, to the number of members of the common class, cannot, from the nature of the case, be ascertained? Thus much upon principle.

The rule is equally clear on the ground of authority. In the case of *Porter v. Fox*, (m) there was a bequest of produce of real and personal estate, in trust, to be accumulated, “for the benefit of the testator’s grandchildren, and his nephew, J. O., and to be distributed in manner and form following, that is to say, as they should become of the age of twenty-five years respectively;” with directions for the transfer of the share of each grandchild and nephew, on their respectively attaining twenty-five. Sir *L. Shadwell*, V. C., having decided, that the gift to the grandchildren was too remote, also held, that the limitation to the grandchildren and nephew was to them, *as a class*; and, therefore, as the whole of the testator’s intention could not prevail, effect could not be given to that part which related to the nephew: his share could not be determined, as it depended upon the number of members of the class, living when the eldest attained twenty-five.

3. But, if the gift is made to the children of a *person deceased*, the vesting of their shares may be postponed to Limitation to children of deceased

(l) 1 Jarm. Wills, 233.

(m) 6 Sim. 485.

person, at age greater than twenty-one, good.

any age, though greater than twenty-one. And this, because, as the hypothesis assumes, that the lives are *in esse*, at the date of the creation of the gift, and, also, implies, their existence, at the time of its taking effect, the extreme period of suspension of the vesting, cannot, possibly, exceed the life of the survivor of several persons *in esse*. (n) Nor does this violate the rule, formerly laid down, that no longer term, than twenty-one years can be used, for the purpose of remoteness of limitations, where a life in being does not form part of the period; because, in the case supposed, the term of years taken, is only a subdivision or subordinate portion of the unascertained period of a life; the premature termination of which will, also, *quoad* the particular life, put an end to the term of suspension.

Same, if limitation to children, expressly named, of a person *in esse*.

4. Upon the same principle, a gift may (it should seem) be made, to the children of a person *in esse*, who are living, and named or *specifically described* in the will or settlement, and the vesting of their shares may be postponed to any age subsequent to minority. In such case, as the limitation does not include after-born children, by reason of its expressed restriction to those named, the period of suspension cannot, possibly, exceed lives in being. For this rule to apply, however, it must clearly appear, from the limitations, that no other children, than those mentioned, are to participate; because, if the gift be sufficiently general in its terms, to include children subsequently born, the accidental existence, or casual mention, of some of the objects of it, will not suffice, to satisfy the provisions of the Rule.

Limitation to issue of unborn children, void.

5. A simple limitation to all the grandchildren, or other remoter issue, of a person *in esse*, is altogether void: and this, without regard to the time of the vesting of their interests; whether at birth, or otherwise. (o) As the living ancestor may beget children, unborn at the time of the creation of the gift, and as all the children of such after-

(n) 2 Prest. Abst. 149.

Posth. 215. 2 Prest. Abst. 168. 1

(o) 1 Sug. Pow. 493. Fearn, e,

Jarm. Wills, 234.

born children are included in the common class, there is, obviously, in such a case, no security, that, even though the shares of the grandchildren vest on their birth, such birth will take place within twenty-one years from the decease of the ancestor, or from the death of the survivor of all his children, who are *in esse* at the death of the testator, or the date of the settlement.

6. If, however, it be provided, by the author of the limitations, that all the grandchildren, who are to take under the gift, shall be born, within twenty-one years after the death of the common ancestor, or, within the like period after the death of the survivor of such of his *children* as are in existence at the time of the creation of the gift, all objection to the Executory limitation, on the ground of remoteness, ceases. (*p*) And this remoteness of the issue from the common ancestor may be indefinitely postponed, provided, care be taken, that such only as come *in esse* within twenty-one years after lives in being, shall be entitled to take under the gift. And so, upon the like principle, limitations may be made, to such a class of grandchildren, or other issue, of a person in existence, as shall be born during the lives of those *children* of the living ancestor who are *in esse*, or during the lives or life of the survivors or survivor of them, and *as shall attain the age of twenty-one years*. And, in such a case, it is to be observed, that the gift is not confined to children of the children who are living, but extends to the issue of unborn children, provided, they are born before the decease of the survivor of the children *in esse*, and provided, they, also, attain the required age.

Secus; if birth of remoter issue provided to happen within prescribed period.

7. Where the gifts are by *will*, and the testator is creating limitations in favor of his own children and grand-children, he may well limit interests to the general class of his grandchildren, whether the issue of children *in esse* at the date

Not necessary, to limit time of birth of remoter issue, in case of gift by testator to

(*p*) 2 Ves. jr. 366. And see, per Lord Roslyn, in *Blandford v. Thackerell*, 2 Ves. jr. 242; and per *Preston*, *arguendo*, in *Bengough v. Edridge*, 1 Sim. 251, and in *Mogg v. Mogg*, 1 Mer. 664. 2 Prest. Abst. 168.

his own grand-children.

of the will, or not, if he provide, that their shares shall vest, at or before they attain their ages of twenty-one years, and it will not be necessary, to limit the time of the births of the grand-children. (g) This arises from the circumstance, that, as all the children of the testator must, necessarily, be born in his lifetime, or directly afterwards, and as all *their* children must, likewise, be born previously to or soon after their deceases, all the grand-children will, in the nature of the case, be born during lives in being; and, that being so, care is only requisite, that the vesting of the shares of the grand-children be not suspended, for a longer term than their respective minorities, or than the minority of the youngest of them. Indeed, an *absolute* term of twenty-one years, after the decease of the survivor of the children, might be taken, and the property be limited, to such of the grand-children only, as should be in existence at the expiration of that period. And so, also, upon the like principle, the vesting of the shares of the grand-children might be postponed to their attainment of any greater age than twenty-one, if it were provided, that they should attain such age within the space of any life in being, or the survivor of several lives in being, and twenty-one years afterwards.

Sed aliter; in case of deeds.

But it must be observed, that this rule does not apply to the case, of a person making provision for his children and grand-children, by *deed*, for, then, the same rules must be abided by, as govern the case of a testator creating limitations in favor of the children and grand-children of a stranger.

Of no importance, whether children take interests, or not.

8. The observations, which have been made, with respect to gifts to grand-children or remoter issue, are, in every respect, applicable to such gifts, whether the *children*, born or unborn, take interests, or not; the circumstance, of gifts being made to them, not affecting the question of the remoteness of the limitations to their issue.

(g) 1 Jarm. Wills, 234.

9. The rules, applicable to gifts to classes of issue, are of equal force, in reference to limitations to any other associated number of persons, whether specifically named, or answering some other description; the sole question, in the consideration of the validity of all such gifts, with respect to remoteness, being, whether they do, or do not, in their very nature, and according to their original form, transgress the boundaries, fixed by the Rule against Perpetuities; or, in other words, whether they may, possibly, include objects, who will not be ascertained or ascertainable, within the legal period.

Same rules applicable to limitations to other classes of persons.

10. Lastly, it is to be observed, that the rule, which declares a limitation to a class of persons, either altogether good, or altogether void, as respects the question of its remoteness, does not apply to those cases, where there are two original distinct limitations, to two different classes, with one general gift-over, upon an event equally applicable to the members of both classes, but which, though good, as regards one of such classes, is void for remoteness, in reference to the other. In such a case, notwithstanding the applicability of the ulterior limitation-over, to both the classes entitled under the prior gifts, it will be good, as respects that class, whose situation admits of the contemplation of such an event, as that on which the gift-over is to take effect, but it will be void, with regard to that class, in reference to whom, the event provided for is too remote. Thus, in a late case, (*r*) a testator devised his real and personal estate, to trustees, upon trust, to sell, and lay out so much as should be sufficient to raise three annuities of 100*l.*, each, and he directed, that they should apply one of such annuities, towards the maintenance and education of his grand-children, the children of his late daughter, H., until the youngest of such children, who should live to attain twenty-three, should attain that age, and from and

Where one gift-over, applicable to two limitations to distinct classes, one of which is good, and the other, void, it is bad only as to objects of prior remote gift.

(*r*) *Cromek v. Lumb*, 3 You. & Coll. 565.

immediately after such youngest child should have attained that age, then, he directed, the capital, from which such annuity was derived, to be paid and divided, unto and equally amongst his last-mentioned grandchildren, share and share alike, as tenants in common: and the testator directed, the other two annuities to be paid to his daughters, C. and W., for their lives, and as to the respective capitals, from which such annuities were derived, he directed his trustees, to pay and divide each of them, from and immediately after the decease of his daughters, C. and W., unto and equally amongst all and every his grandchildren, then living, (children of H.,) and all the children of C. and W., as well those then living, as those which might thereafter be born, share and share alike, &c.: and as to the residue of the monies to accrue from the sale of his real and personal estate, he directed his trustees, to pay and divide the same, unto and equally amongst the children of H., then living, and the children of C. and W., then living, or to be born during his lifetime, as tenants in common: the testator then declared, that the legacies or shares should vest in the grand-children, *at twenty-three*; and that *if any should die under twenty-three*, without issue, then, the legacies or shares of them so dying should go and accrue to the survivors and survivor of them, to be equally divided between them, share and share alike. Some of the children of the deceased daughter, H., as well as of the other daughters, C. and W., died under twenty-three. It was held, that a son of H., who survived another child who died under twenty-three, was entitled to a portion of such deceased child's share, under the gift-over; but that the limitations-over of the annuity-fund, from which C. and W. took their life-annuities, were void for remoteness. In this case, we perceive, that, as the daughter, H., was dead, at the date of the will, the divesting of the shares of her children, in the event of their deaths under twenty-three, was not too remote a disposition, in accordance with the rule, on that

head, above-stated ; but, with respect to the bequest to the children of the daughters, C. and W., the event contemplated was too remote, as it would not, necessarily, happen, within twenty-one years after the decease of those daughters, or of the particular daughter, to whose issue, the respective capital funds were bequeathed.

It will have been observed, that the contingencies, contemplated in the limitations, to which our inquiries have here had reference, have been those, only, connected with the *age* and *time of birth* of the classes of persons in question. The cases of limitations to classes, void by reason of the remoteness of *other* kinds of contingencies affecting the objects of them, belong more properly to the subject of the next Chapter.

CHAPTER XVIII.

OF THE RULE AGAINST PERPETUITIES, AS IT AFFECTS LIMITATIONS TO PERSONS ANSWERING A CERTAIN DESCRIPTION, OR POSSESSING A SPECIFIED QUALIFICATION.

Remarks, as to nature of gifts here considered.

As every gift of a future interest in property should be so limited, as that it must vest absolutely within the legal boundaries of remoteness, it follows, that a limitation to a person, not *in esse*, is void, not only, when it suspends the vesting for a longer period than the attainment, by the object of it, of the age of twenty-one years, but, also, when the acquisition of the absolute interest is made to depend, upon the existence of some qualification in the donee or devisee, with which he will not necessarily be clothed, before the expiration of the fixed limit of perpetuity. If the donee or devisee (being an ascertained person) be in existence, there is, of course, no necessity, for fixing any period, within which he shall acquire the qualification demanded by the terms of the limitation; as, if attained at all, it must be, within the limits of a life in being. But if he be not *in esse*, at the time of the limitations being created, or, if it be uncertain, whether the person, eventually answering the description, will prove to be an individual in existence, or not, it is obvious, that the requirements of the Rule against Perpetuities will not be satisfied, by anything less than the fixation of proper limits, in regard to the period, within which the requisite qualification must be acquired.

Case of *Procter* Thus, in one case, (s) a devise was made, to the first or

(s) *Procter v. bishop of Bath and Wells*, 2 H. Bl. 358.

other son of T. P., (who was living, and who had then no son,) that should be bred a clergyman, and be in Holy Orders, and to his heirs and assigns, but if the said T. P. should have no such son, then, to T. M., his heirs and assigns. T. P. died without ever having had any son, whereupon, the property was claimed by a person deriving title under the will of T. M., the devisee-over, whose right depended upon the question, whether the Executory devise to the son of T. P., was, or was not, too remote. It was argued, for the claimant under the ulterior devise, that, as, by the Canons of the Church, no person could be admitted into Deacon's Orders, before the age of twenty-three, without a faculty, nor, could be ordained Priest, before twenty-four, the vesting of the Executory devise was postponed until the devisee attained his age of twenty-three years, and was, therefore, void. The Court of C. B. held, that the first devise, to the son of T. P., was void, by reason of the uncertainty, as to the time when such son, if he had any, might take Orders, and that the devise, expectant upon it, was, also, void.

v. bishop of
Bath and
Wells :—devise
to unborn per-
son when in
Holy Orders.

In this case, it will be observed, there was the special circumstance, that, from the nature of the qualification required, the interest of the devisee could not vest, until he had attained the age of twenty-three, at the least, which may seem little different from an *express* provision, suspending the vesting, until the like period. But, it is conceived, that, however that circumstance may have been pressed, in the argument, against the validity of the Executory devise, it had no peculiar weight with the Court, in the decision on the question of the remoteness of the limitation, but that that decision proceeded, (as it is reported to have done,) upon the ground, of "the uncertainty, as to the time when the devisee might take orders." The case, may, consequently, be treated, as an authority, applicable to every instance of the postponement of the vesting of a limitation, until the acquisition, by the donee, of some qualifi-

Observations
upon *Procter*
v. bishop of
Bath and
Wells.

cation, which he will not necessarily possess, within the proper period.

If, therefore, a limitation were made to an unborn person, upon his acquiring some qualification, which he might attain at any period of his life, however remote, it seems clear, that the gift would be void, however great the probability, that the donee would be clothed with the requisite capacity, *during his minority*. Thus, suppose, property to be limited, to the first (unborn) son of A., who shall obtain a commission in the army, or go to the bar, or take a degree at one of the Universities, or marry, or go to Rome, or do any other act, the performance of which is not *necessarily* confined to the minority of the donee, there can be little doubt, that, upon strict principle, the Rule against Perpetuities would be violated, and that the limitation would be void; and *that*, without regard to the course of subsequent events. (†) Indeed, in the case of *Procter v. bishop of Bath and Wells*, it will be observed, that there was nothing more than a *possible* transgression of the boundaries of remoteness, as the Executory devise *might* have become capable of taking effect, during the lifetime of the father of the devisee, or, even, of the testator, by the birth of a son of T. P., and an admission of him to Holy Orders, within the compass of either of those lives.

And it may even happen, that a gift may be void for remoteness, by reason, merely, of its requiring the donee to be a person, filling some character, or possessing some general qualification, without reference to his being a person *unborn*, or any one else, in particular; although it may chance, that there is a person *in existence*, who may ultimately acquire the requisite capacity, and who, in the event, actually does so.

Thus, in a modern case, (‡) lord V. bequeathed certain household goods, furniture, pictures, books, linen, &c., to

Case of
Tollemache v.
earl of

(†) See 1 Jarm. Wills, 233, 243, n.

(‡) Lord *Deerhurst v. duke of St. Albans*, 5 Madd. 232; S. C. in

Dom. Proc. *sub nom. Tollemache v. earl of Coventry*, 8 Bligh, N. S., 547.

trustees, upon trust, to permit his wife, to have the use of them, during her life, and after her death, to permit his son, to have the use of the same goods, &c., during his life, and after the decease of the survivor of the testator's said wife and son, in trust for such person, as should, from time to time, be lord V., it being the testator's will, that the goods, &c., should, after the decease of his wife, from time to time, go and be held and enjoyed with the title of the family, as far as the rules of law and equity would permit. On the death of the testator, the barony of V. descended upon the son named in his will; and, upon the death of the son, the title descended to his son, (who was living at the death of the testator,) and, upon the death of the grandson, it descended to *his* son, who was born after the testator's death. Upon the question, who was entitled to the goods, &c., as between the personal representatives of the grandson and those of the great grandson, Sir *J. Leach*, V. C., decided in favor of the title of the latter, upon the ground, that, by the rules of law and equity, every person, living at the death of the testator, who should become lord V., *might* have been made legatee for life, with a remainder, of the absolute interest, to the person next in succession, and that, as the grandson was in existence at the death of the testator, he might be limited to the use and enjoyment only, with the absolute remainder to his son, the next successor. This judgment, however, as well as an affirming decision of Lord Chancellor *Lyndhurst*, was reversed in the House of Lords; which Court adjudged the title to the goods, &c., to be in the representatives of the testator's grandson. The following observations of Lord *Brougham*, on this appeal, are elucidatory, in so great a degree, of the principles, applicable to dispositions of the class under consideration, that little apology can be needed for their introduction, at length, in this place. "The person," said that learned lord, "who, secondly, after the death of the testator, became lord V., (the grandson,) was *in esse* at the date of the will; but,

Coventry: —
bequest to
persons from
time to time
succeeding to a
barony.

whether he would take, or whether he would ever be lord V., was, at the time, uncertain. The next life-estate, after those named in the will, was, not to the person by name, but, to the lord V., whoever he might be. It was an attempt, to create a new species of limitation in succession, to spring up with the person, contrary to all rule and analogy, for restricting the period of tying up or deferring the vesting of estates in fee, or absolutely. Being, or coming into *esse*, is a notion familiar to the law, but a peer does not, in a legal sense, come into existence. It was argued, for the respondent, that it was the same thing, as limiting to the son and grandson and great grandson, successively, because they must succeed to the inheritance of the dignity, in this order. But that view is not quite accurate; for it was not certain, that either of them would be lord V. Upon a barony in fee, by writ of summons, or creation, the first taker might have a son, and that son might only have two daughters; what person would then take the title? It would be in abeyance; and until the Crown should please to select one of them to hold the dignity, it would remain in abeyance; and there might be no peer, during the lives of the two co-heiresses. In the case put, of an abeyance of the title, the Crown might not select either or any of the daughters, and, in that case, the title might remain in abeyance, for a century; and such an event would demonstrate, that the limitation is not partially, but, altogether, void. It is said, that the case has not happened; but the soundness of the limitation cannot depend upon contingencies, which may cause it to be good or bad, according to the event. Suppose, again, the limitation of this peerage to be by patent. If the eldest son had a brother, who would succeed in default of issue of the eldest son, and afterwards commits treason, and is attainted;—during the life of that son, and so long as there is any issue of that eldest son, the title would remain in abeyance. The title would not be extinct, but would be in the Crown, so

long as any of his issue should exist; and, upon failure of the issue of the attainted person, there might be a lord V. These instances show the novelty of the invention, and the difficulty of giving it complete effect. (v) There is a distinction between limitations, upon events known to the law, and such as the testator, in this case, has made the basis of his limitation. Peerages are not by the hand of nature, but of the creation of the crown; and their origin and continuance are uncertain. To argue, from the fact, that the person was in *in esse* at the date of the will, who became lord V., is to rely upon an accident. The event might have been otherwise; he would not, *ex necessitate*, answer the description, within the allowed period. A limitation, to be supported, must be definite and certain, to the man, or to the peer, as an individual. It is not allowable, to contend, that, at one time, and, for one purpose, it is to the man, and, for another time and purpose, to the peer. The estate must be certain, so as, within the time, to vest in the person described, either in his natural, or his politic, capacity. In the politic capacity, there was no such lord V. *in esse*, in whom the estate would, within that time, certainly vest."

(v) It may be suggested, whether these observations are not applicable, with equal force, to the *first* individual becoming entitled under the limitation, to the person who should from time to time be lord V., (i.e. the grandson,) as, to the *successor* of that person. How could it be foretold, that, at the death of the son, there would be a person, capable of succeeding as lord V., seeing that there were the contingencies, with respect to the abeyance of the peerage, pointed out in the observations of Lord *Brougham*? and if such a state of things could not be predicated, where was the security against the violation of the Rule against Perpetuities? The true ground, on which to rest the exclusion of the great grandson from the benefit of the limitation,

seems to be, that, at the time of its creation, it could not be said, that he, or any other person succeeding to the barony, after the death of the person first becoming entitled under the gift, would so succeed, within the period fixed by the law for the vesting of future interests. Doubtless, had it appeared from the will, that the grandson was in existence at the date of it, the property might have been limited to him, if he should succeed to the title of lord V., and, after his decease, to his eldest son, if he should likewise so succeed; as it must have been ascertained, at the decease of the grandson, whether the great-grandson did succeed to the title, or not.

In this case, it will be perceived, that, although it was not pointed out in the will, who should be the person first entitled under the limitation, as lord V., the gift was good, because, were there any succession to the title at all, that succession must take place, at the death of the son, the legatee for life; which was not a period of too remote expectancy. But, as respected the party *next* entitled under the limitation, there was no such guarantee: it could not be predicated, that *he* would acquire the requisite capacity, or, in other words, succeed to the barony of V., within the prescribed limits of remoteness.

Case of
Mackworth v.
Hinrman:—
bequest to
persons, on
whom a baron-
etcy should
from time to
time devolve,
for life.

And, so again, in another case, (*w*) a testator bequeathed personalty, to trustees, in trust, to pay the interest, to sir G. A., baronet, for life, and after his decease, to his eldest son; but in case he should die leaving no son, then, in trust for the person on whom the baronetcy should devolve, so that each baronet should take the interest, for life; and after the extinction of the baronetcy, to fall into the residue of the testator's estate: at the death of the testator, sir G. A., and his two brothers, J., and R., were living: sir G. A. dying without issue, the baronetcy devolved on J., who, also, died without issue, leaving his brother surviving him; to whom the baronetcy descended. Lord *Langdale*, M. R., observed, that giving a life-estate to each baronet successively (no expression being used, applicable to any particular person on whom the baronetcy should devolve,) would have the effect, of defeating the general intention of the testator, and that, therefore, J., being the person first succeeding to the title, took a *quasi-estate-tail* in the property, which vested it absolutely in him; although the person, next succeeding to the baronetcy, was *in esse* at the death of the testator.

Case of *Bacon*
v. Proctor:—
devise of rents

In reference to the construction acted upon in this case, a previous one is to be cited, which seems to present a

(*w*) *Mackworth v. Hinrman*, 2 Keen, 158.

distinction, worthy of notice. In the case alluded to, (x) to the person for the time being succeeding to dignity of premier baronet.

sir E. B., premier baronet of England, after devising certain estates, to trustees, upon trusts, for raising and paying certain charges to which they were subject, directed the trustees, from time to time, to pay the rents and profits, unto such person, of his own name blood and family, as, for the time being, should succeed to and be invested with his title and dignity of premier baronet of England; to the intent, that the said estate might be continued and preserved in the name blood and family of him the said sir E. B., and that the rents and profits thereof might be enjoyed and go along with his said title and dignity of premier baronet of England, so long as the rules of law or equity would permit; but, if, upon failure of issue male of his body, there should not be any person, who, under the letters patent whereby his said title or dignity was created, should be entitled to have and enjoy the same, so that such title and dignity should become extinct, then, the testator directed, that the trustees should stand seised of the said estates, in trust for his heir-at-law. A bill was filed, by the person who succeeded to the baronetcy on the testator's death, insisting, that the above-mentioned trusts were absolutely void, as being too remote, and tending to a perpetuity, and that he was entitled as heir-at-law; or, if the Court should consider the trusts valid, then, that the plaintiff, as answering the description of the first person, of the testator's name blood and family, who had succeeded to the baronetcy, was entitled to the real estate devised, in fee-simple, or, at least, in tail-male, subject to the trusts for raising the charges. On the other hand, it was said, that the Court might determine, that the plaintiff was entitled, for life, and then stop; or go on, by declaring a remainder-over, to such person, as, at the plaintiff's death, should be premier baronet, for life, or, in tail, according as he was

(x) *Bacon v. Proctor*, 1 Turn. & Russ. 31.

born before or after the death of the testator, remainder, to the heirs male of the body of the first baronet. Other objections to the validity of the trusts having been disposed of, it was observed, by *Graham, B.*, sitting for Sir *Thomas Plumer, M. R.*, that it was not necessary, to declare, beyond the estate to which the plaintiff was entitled; and that the clearest view of the case, therefore, was, to declare the plaintiff entitled to an estate for life, subject to the debts and charges.

Observations
upon *Bacon v.*
Proctor.

The distinction between this decision and that in *Mackworth v. Hinxman*, it will be observed, consists in this,—in the latter case, the Court held, that the person, first answering the description of baronet, took a quasi-estate-tail, on the ground, that the limitation, as to all subsequent successors to the dignity, was invalid, as too remote; while, in *Bacon v. Proctor*, the first baronet taking under the trust was restricted to a life-interest. This difference must, it is conceived, be referred to the circumstance, that, in the last-mentioned case, the person first taking under the trust, as the immediate successor to the baronetcy, would, necessarily, be *in esse* at the death of the testator, and that, therefore, a contingent interest might properly be limited, in remainder expectant on the decease of such first baronet: but in *Mackworth v. Hinxman*, the limitation to the successive baronets was preceded by life-interests, given to two persons *in esse*, and the individual, first becoming entitled under that limitation, was not, necessarily, therefore, a person *in esse*, and, consequently, no expectant interest could be limited, which would be contingent until the decease of the individual, first taking under the limitation to the successive inheritors of the dignity.

This important variation, in the circumstances of the two cases alluded to, is abundantly sufficient, to explain the difference in the construction applied to each, without resorting to the alternative of supposing, that the decision in *Bacon v. Proctor* was grounded on the very questionable

doctrine, (advanced at the bar,) that the first baronet might take a life-interest, with a remainder-over, to such person, as, at his death, should be baronet, *for life, or in tail, according as that person was born before or after the death of the testator.*

Further, in a very recent case, (y) before Lord Chancellor *Sugden*, (to return to our original inquiry,) a testator, being possessed of a term of years, bequeathed it, to five trustees, in trust, to pay an annuity, to his wife, for her life, and subject thereto, in trust, to pay certain sums, yearly, for the maintenance of his grandson, A. T., until he should attain the age of twenty-one, and, then, in trust, to permit A. T. to take the profits, for his life, and after his decease, to permit such person, who, for the time being, would take by descent, as heir male of the body of the said A. T., to take the profits thereof, until some such person should attain the age of twenty-one, and, then, to convey the same, unto such person so attaining the age of twenty-one years, his executors, &c., with limitations-over: A. T. had an heir male, who attained twenty-one within the proper period. It was held, that the limitation to the heir male of the body of A. T., who should first attain twenty-one, was void, as too remote; and that the gifts, subsequent to that limitation, were, also, void. Here, it will be perceived, that, as it could not be said, that there would be any heir male of A. T., attaining twenty-one, within the requisite period of time, (for successive heirs male might die in their minorities,) the limitation, expectant on A. T.'s life-interest, was, necessarily, void for remoteness. The Lord Chancellor's observations upon this case are well worthy attention: but the following show the exact ground of the determination. "There can," said the learned judge, "be no question or doubt, that, to some extent at least, this gift is void; for you might travel for centuries, before a person could be

Case of *Kerr*
v. lord
Dungannon.—
bequest to first
person taking
by descent as
heir male who
should attain
twenty-one.

(y) *Kerr* v. lord *Dungannon*, 1 Con. & Law. 335; 1 Dr. & War. 509.

found, who would exactly answer the description. There might be a succession of heirs male, and yet you could not predicate of any one of them, that he would be the heir male, who should first attain twenty-one. Thus, centuries might elapse, before any person was actually entitled, under the description in the will."

It is observable, that the title of the person, first answering the description of heir male attaining twenty-one, was attempted to be supported, by the argument, that there was an intention, to give some interest, immediately upon or after the death of the grandson; and that the clause might be read, as if it contained a distinct gift; and that, as there was a person, answering the description, living at the requisite time, and as he did attain his age within the requisite period, there was nothing to prevent the Court from giving it effect. But this argument was very properly rejected as unsustainable.

It must be remembered, however, that a similar rule would not hold in regard to a legal limitation of real estate, of the character of the gift in *Kerr v. Lord Dungannon*, for, as, in that case, the limitation, to the heir male of A. T., would be a remainder, it must have failed or taken effect, at the decease of A. T., and could not, therefore, be liable to any objection of remoteness.

Case of Liley v. Hay:—
deviso of rents,
to be distributed
yearly among certain
families.

There is also another recent case, (z) calling for notice in this place, where a testator devised real estate, to trustees, upon trust, to receive the rents, and, after making certain annual payments, to "apply the remainder, if any, in manner and form following, that is to say, *on every first of December*, or Saint Thomas's-day, to distribute amongst *certain families*, according to their circumstances, as, in the opinion of the said trustees, they may need such assistance, whose names are hereinafter mentioned" (then followed the names and descriptions of twenty-four persons). It was

(z) *Liley v. Hay*, 1 Hare, 580.

contended, on the part of the testator's heir-at-law, that this trust was liable to the objection of tending to create a perpetuity; an objection which, it was said, was fatal to the devise altogether, for it could not be severed, and sustained as good in part only. On the other hand, it was argued, that the persons entitled under the gift, or, at least, many of them, were living, and were in a position to take, immediately, the benefit of the gift; and that such a mode might be adopted, of carrying the trust into effect, as should not transgress any rule of law. Sir *James Wigram*, V. C., after observing, (in reference to another objection,) that the Court could and would put a construction upon the word, "family," where it could be reasonably done, rather than that a devise should be void, said, that view of the case disposed of the objection, as to the trust tending to a perpetuity, *at least during the lives of the parties named in the will*, who, under a construction to be put upon the word, "family," might claim an interest under the will, immediately upon the death of the testator; and that, where a will declared, that objects were to take in succession, there was no reason, why the Court should hold the will void, as to those objects, to whom an *interest, not extending beyond their own lives, was given, immediately at the testator's death*. It should seem, therefore, that his honor's opinion was in favor of the validity of the trust, at least, during the lives of the persons named in the will; and, it may be added, the learned judge also evinced an inclination, to support the devise, beyond those limited interests;—a disposition, which might, probably, be carried out, by giving the absolute interest, to some person or persons, who, after the decease of the immediate objects of bounty, should be considered, best to represent the description of the *families* of such deceased legatees.

Besides the class of cases we have been considering, there is another, closely allied to it, where interests are attempted to be limited, in succession, to a line of persons, in right of

Limitations of
rents to persons
from time to
time in posses-

sion of certain property.

their ownership or proprietorship of some other property, but, in such a manner, as that the individuals, successively answering the description, cannot be pointed out or ascertained, or their interests vest, before the period of their actually becoming entitled in possession. If, for example, a testator devise the *rents* of property, to the person or persons who shall, from time to time, be lord or lords of the manor of A., it is manifest, that, to all intents and purposes, a settlement in perpetuity is attempted to be effected; for, if the limitation were carried out to the letter, no person, succeeding to the manor of A., could make an absolute disposition of the property devised, apart from the ownership of the manor.

Case of
Charity Commissioners v. baroness De Clifford.

In these cases, therefore, it seems, that the Courts adopt a construction, very similar to that acted on in the before-cited case of *Mackworth v. Hinckman*, and hold, that the fee-simple of the property vests in the person, answering the description required, when the devise takes effect. An instance of this class of gifts occurred in a very recent case, (a) where a testator, having devised certain lands, to trustees, in trust, to appropriate the annual rents, for charitable purposes specified in the will, declared, that, in the event of there being an increase in the rents, by any new letting, the surplus so to arise should go to the *person or persons*, of the S. and C. families, *who, for the time being, should be lord or lords, lady or ladies, of the manor of D.*; and it was held, that there was a clear equitable devise, in fee, to the person, who, at the decease of the testator, became seised of the manor of D.

General observations as to this class of gifts.

In conclusion, it is to be observed, that the two above-cited cases of *Procter v. bishop of Bath and Wells*, and *Tollemache v. Coventry*, may be considered, as constituting the landmarks in the pursuit of this branch of the law of Perpetuity; and, as establishing the general rule,—that

(a) *Commissioners of Charitable Donations and Bequests v. The baroness De Clifford*, 1 Dr. & War. 245.

wherever an Executory limitation is made to an unborn person, to vest, on his answering some description, or possessing some qualification, not necessarily to be attained (if at all,) during his minority, and, also, where a gift is made to a person who shall fill a certain character, but which will not, *ex necessitate*, be acquired, within the legal limits of remoteness, (whether, or not, there be a person *in esse*, who may possibly realize the description,) such Executory limitation is void, as too remote; equally with a gift to an unborn person, which is not to vest until his attainment of some ascertained age, greater than twenty-one.

CHAPTER XIX.

OF THE RULE AGAINST PERPETUITIES, AS IT AFFECTS LIMITATIONS UPON EVENTS OF INDEFINITE OCCURRENCE.

Limitations on events which may happen at any period of time, too remote.

THE Rule, requiring all future limitations to be such, as, if they take effect at all, will necessarily operate within the period of lives in being and twenty-one years, obviously, condemns, as invalid, every gift of a future interest in property, made to depend on an event, which, although it may, possibly, happen within the allowed period, may, possibly also, not happen until after the expiration of such period. Limitations of this character little differ from gifts to unborn persons attaining a particular age, or answering a particular description, which will not, as a matter of necessity, be attained or acquired, if at all, within the proper period; and, like them, therefore, they are wholly void. The test is simple; and, how varied soever the nature of the contingencies, the application of it seems equally so.

It will suffice, consequently, to present a few instances of void gifts of this kind, which may serve to show, to what cases, the principle in question extends; leaving to the learned reader's penetration, its application to supposable cases.

Illustrations of this kind of void limitations.

In the first place, it may be observed, that, wherever, in the cases discussed in the last Chapter, a limitation is void, as made to a person, upon his possessing some qualification, with which he will not necessarily be invested, within the prescribed period, an ulterior gift, in default of the object

of such void limitation, is equally invalid. It follows, therefore, that a limitation, depending on the event, of an unborn child not taking Holy Orders, or not obtaining a commission in the army, or not going to the bar, or not taking a degree at one of the Universities, or not marrying, or not going to Rome, or not doing any other act, the performance of which is not necessarily confined to the minority of the unborn person, is wholly void for remoteness.

Upon the like principle, also, it is clear, that a gift, to take effect upon the extinction of a dignity, by failure of the line of persons to whom it is descendible, (b) and, also, a gift, depending on the contingency, of no heir male or other heir of a particular person attaining twenty-one, (c) or other specified age, (no individual being particularized as answering that description,) are entirely invalid, although the extinction of the dignity, in the one case, and the failure of the heir male, in the other, take place, at the decease of a person, *in esse* at the time of the creation of the limitations.

An instance of a limitation of this kind occurred in a very recent case, (d) formerly cited, where a testator devised lands, to trustees, and directed the yearly rents, then of an amount specified in the will, to be appropriated, for certain charitable purposes, and declared, that in the event of there being an increase in the rents, by any new letting, the surplus so to arise, should go to the only use and behoof of the person or persons, of the S. and C. families, who, for the time being, should be lord or lords, lady or ladies, of the manor of D.; and, *in case the same families did not protect the said charities*, or if the said families should become extinct, then, and in either of the said cases, the trustees were to apply the said surplus rents, in addition to the former

Case of
Charity Com-
missioners v.
baroness De
Clifford:—
gift-over on
neglecting to
protect
charities.

(b) See *Bacon v. Proctor*, 1 Turn. & Russ. 31; *Mackworth v. Hinzman*, 2 Keen, 658.

(c) See *Kerr v. lord Dunganon*,

1 Con. & Law. 335.; 1 Dr. & War. 509.

(d) *Commissioners of Charitable Donations and Bequests v. baroness De Clifford*, 1 Dr. & War. 245.

provision for the charity: and it was held, by Lord Chancellor *Sugden*, that the gift-over, to the trustees for the charity, was too remote, as the contingency, of the S. and C. families neglecting to protect the charities, was not restricted to the proper limits.

Limitation on family becoming extinct.

It is equally clear, however, that the gift-over would have been void, had it contemplated only the circumstance, of the *extinction of the two families*, for such an event would have been, also, of indefinite expectancy.

Gift-over on charity-trustees not performing trusts.

Similar to the first branch of the contingency, in the last-cited case, were, the gifts, in two recent cases of informations against charity-trustees; but, in which, no decision was called for, upon the validity of the gift-over.

In the first of these cases, (e) a testator devised estates, to the Cordwainers' Company, for the interest, use, and performance of his will, and, after bequeathing some legacies, the testator directed the Company, to make certain yearly specified payments, to the charitable purposes mentioned in the will, and, in a subsequent part of the will, the testator declared, as follows:—"provided always, that if the said master, wardens, fellowship, and company of the craft or mystery of Cordwainers aforesaid, do not well and truly perform, fulfil, and keep all and singular the thing and things above said by them to be observed, performed, fulfilled, and kept, but do cease in doing of the same, by the space of one year, contrary to this my last will and testament, that, then it shall be lawful for my said brother, D. F., and his heirs, into all the said lands, tenements, and other the premises, with the appurtenances, to enter, and the said premises, to keep, have, hold, and enjoy, to him, his heirs and assigns, for ever; and the said masters, wardens, fellowship, and company to be clearly expelled, discharged, and put out of the premises." There can be no question, that a gift of this kind would be wholly unsustainable, were ad-

(e) *Attorney-General v. Cordwainers' Company*, 3 My. & K. 534.

vantage ever attempted to be taken, of breach of duty by the trustees of a charity.

In the other case, (f) alluded to, a testator devised certain houses, to the master wardens of the Company of the Coopers, upon divers charitable trusts mentioned in the will; and the testator subsequently declared, that, if the said master wardens neglected to carry out the trusts for the space of one whole year, then, the master wardens of the company of Grocers should enter upon the said houses, "and they to repulse and put out the master wardens of the Company of Coopers, for ever; and the master wardens of the Company of Grocers to enjoy them, and have them for ever, and do with it, as shall seem good to them, and to do and use them, as they do with any lands belonging unto them." This is, unquestionably, another instance of a limitation, void for remoteness, as depending on an event of indeterminate occurrence. (ff)

In fine, let the event contemplated be what it may, and the probability of its early occurrence, as great as it may, it will, in every case, be of too remote expectancy, and a limitation depending upon it will, therefore, always be void, unless, either, from the nature or internal quality of the contingency, or, from express provision and restriction, it be certain, that the event which is to give effect to the limitation will happen, if at all, within the period of lives in being and twenty-one years.

(f) *Attorney-General v. Coopers' Company*, Beav. 29.

(ff) See judgment in *Charity Commissioners v. De Clifford*, 1 Dr. & War. 245.

CHAPTER XX.

OF THE RULE AGAINST PERPETUITIES, AS IT AFFECTS POWERS OF APPOINTMENT, AND LIMITATIONS IN PURSUANCE OF THEM.

A CLASS of limitations, of great importance, viewed in reference to the perpetuity-rule, is that, comprised under the denomination of *Powers of appointment*, including gifts taking effect *under exercises* of such Powers.

Reasons of the applicability of the laws against remoteness, to Powers, and appointments under them.

The maxim, *quod facit per alium facit per se*, necessarily implies, that that, which it is not allowable for an individual to do himself, must be equally improper, when effected in the person of another. A limitation, therefore, which is too remote, if attempted by a person seised in fee, or possessing the absolute interest, is equally objectionable, when made by another, to whom that person has entrusted a power of disposition, in favor of particular objects, and not itself commensurate with the entire ownership of the property. And, consequently, our laws of property have wisely surrounded the limitation and execution of Powers of appointment, with the same beneficial restrictions, as a regard for the interests of commerce has found to be necessary, in relation to the exercise of the ordinary rights of alienation and transfer, proper to absolute *ownership*.

But, before proceeding to inquire, more particularly, into the application of the doctrines of remoteness, to Powers of appointment, and gifts in pursuance of them, a brief notice must be taken of a class of such limitations, which, on account of their near affinity to an absolute *property*, have

not been considered, as calling for any restrictions, peculiar to their character of Powers, but such only as would be applicable, were the donee of the Power *absolute owner* of the property.

The Powers, referred to, are those called *general Powers*, *i. e.*, Powers which give a right to the donees, to appoint to whomsoever they please. (g) Of this kind, is a limitation of property, to such Uses, or upon such Trusts, as A. shall appoint, and, subject to any appointment, to A., in fee, or to B., in fee, or to any other person, or succession of persons, for life, in tail, in fee, or otherwise. In such cases, as the Power is so general and absolute, as to be equivalent, for the purposes of alienation, to the ownership in fee-simple, an appointment under it, so far as concerns the proper period for the vesting of the interests thereby conferred, rests on the same footing with an original conveyance. Nor is there any greater tendency to a perpetuity, in a general Power of appointment over property, and the possibility of the exercise of such Power, in opposition to the laws of remoteness, than, in a simple absolute right of ownership. The general Power authorizes as complete and as immediate a disposition of the property, as could be effected, were the donee entitled to the fee or absolute interest; and it is, of course, clear, that such a Power may be exercised by the donee, in favor of himself. And, as regards the estate limited in default of appointment, when not given to the donee of the Power, (h) there can be no necessity, to consider, how far a perpetuity may be created, because, although that estate is liable to be defeated, at any time, by an exercise of the Power, yet, the great aim of the laws against remoteness is

Exercises of *general powers*, subject only to same restrictions, as alienation by tenants in fee.

(g) See 1 Sug. Pow. 495.

(h) In reference to this point, it has been said, (1 Sug. Pow. 497,) "no perpetuity is created, in regard to the person who takes until appointment,

beyond the life of the donee": but this seems an insufficient argument, as it does not meet the supposable case of the Power being given to a person, and his heirs, or other representatives.

secured, in the *immediate* and *unrestrained alienability* of the property, by means of the Power. It may be true, that any alienation of the property must be, merely and simply, by virtue of the Power, and that the exercise of such Power must take effect, by reference to the deed or will creating it, and, so far, a necessity may seem to exist, for restricting the donee, to the appointment of interests, which would have been good, if limited in the original will or settlement; but, if the essence of a perpetuity be wanting in the nature of the Power, or, rather, if the scope and spirit of the Power be directly adverse to a perpetuity, it seems too much to argue, that it will not authorize limitations, which might have been created, by a person having the absolute dominion; *i. e.*, such limitations as will necessarily vest, within lives in being and twenty-one years, computed from the time at which they are raised.

It is a consequence of this exemption of general Powers from the restrictions of the Rule against Perpetuities, that, under a Power to A., to appoint, by deed, to such Uses, &c., as he shall think fit, property may be limited, to a son of A., unborn at the time of the *creation* of the Power, (but *in esse* at the period of its *execution*,) with remainder, to his issue, as purchasers; a settlement which could not have been effected by A., or any other person, at the date of the *instrument creating the Power*, (unless the birth of the issue in the second degree were restricted to take place within the proper period,) but, of which, the alteration of circumstances at the time of the *appointment*, admits.

Limitations under particular Powers must be such as would have been valid, at time of creation of latter.

But, with reference to all other Powers, *viz.*, Powers restrained to particular objects, and not commensurate with the entire dominion; which are contradistinguished from general Powers, by the denomination of *particular Powers*; as the limitations to be appointed, in some degree, receive their form and condition from the original settlement or will, the period prescribed for the vesting of those limitations must be reckoned from the *instrument creating the*

Power, and, unless so given, as that they shall necessarily vest, (if at all) within such period, they will be void, as too remote. These Powers do not authorize a disposition, such as might have been made by a person absolutely entitled: they may enable the donee, to limit a *fee*, or absolute interest; but not, *to whom he pleases*: and as the entire property is not capable of unrestricted alienation by means of the Power, the Rule against Perpetuities requires, that all limitations, made in pursuance of it, shall be such only, as would have been valid, if inserted in the original will or settlement. (i) Unless the exercise of Powers of appointment were so restrained, a facile method would exist, for constantly evading the Rule for the prevention of Perpetuities; while, as well, in the eye of the law, as, in fact, the appointment, when made, becomes part of the existing settlement, and takes effect with reference to it, and, in the case of realty, out of the same original seisin, upon which that settlement was based. (k)

These observations premised, it will be proper, to inquire into the rules and distinctions, to which, the application of the doctrines of remoteness, to Powers of appointment, and to limitations made by virtue of them, has given rise.

1. Every Power, the direct object of which is to create a perpetuity, is absolutely void. (l) Thus, where (m) John,

Powers, the object of which is to create a

(i) 1 Sug. Pow. 498. 1 Jarm. Wills, 248.

(k) In reference to the distinction between general and particular Powers, as they are affected by the laws of remoteness, see *Butler's* note to Co. Litt. 271, b. n. iii. 4; *Powell's* note to F. Ex. Dev. 375. It must be remarked, that Mr. *Powell* laboured to establish, that, except where the general Power of appointment, and the fee simple in default of appointment, are vested in the same person, by the deed creating the Power, an appointment, under a general Power,

is to be governed by the same rules, as all other appointments; but such a notion is no where entertained, at the present day. It has been deemed unnecessary, to introduce, here, the arguments of the learned writer, alluded to, as an especial regard has been had to them, in the observations in the text.

(l) 1 Sug. Pow. 180. 1 Jarm. Wills, 247, 248. 4 Cru. Dig. tit. XXXII. c. 26, ss. 16, 17.

(m) *Spencer v. Duke of Marlborough*, 5 Bro. Parl. Ca. 592. And see *Heath v. Heath*, 2 Eden, 330.

perpetuity,
void.

Case of
Spencer v.
Duke of
Marlborough.

duke of M., devised all his estates, to trustees, and their heirs, to the use of his daughter, H., countess of G., for life, with remainder, to lord R., her eldest son, for life, with remainder, to trustees, to preserve contingent remainders, with remainder, to the first and other sons of lord R., in tail-male, with remainder, to lord R. S., eldest son of the testator's second daughter, A., countess of A., for life, with remainder, to trustees, to preserve contingent remainders, with remainder, to his first and other sons, in tail-male, with remainder, to lord C. S., afterwards duke of M., and his issue male, in the same manner; and the testator empowered his trustees, on the birth of each son of the said lord R. S., and lord C. S., to revoke and make void the respective uses, limited to their respective sons in tail-male, and, in lieu thereof, to limit the property, to the use of such sons, for their lives, with immediate remainders, to the respective sons of such sons, severally and respectively, in tail-male: upon a question, as to the validity of the Power of revocation and new appointment, given to the trustees by the will, it was adjudged, by the House of Lords, in accordance with the unanimous opinion of the judges, and in affirmance of a decree of the Court of Chancery, that the Power was wholly void, as tending to a perpetuity. In this case, the effect of any attempted exercise of the Power would have been, to vest estates for life, in persons unborn at the date of the will, with remainder, to the issue of such persons, respectively, in tail-male; which, as we have seen, cannot be effected by direct limitations in a settlement, unless the birth of the remoter issue be confined within proper limits; and, there being no such restraint, in reference to the issue to be entitled under an appointment by the trustees of the duke of M.'s will, the Power was necessarily void. But it may, perhaps, admit of question, whether, as the Power was *capable* of being exercised, in favor of issue within the rule of law, (*i. e.*, by appointing life-estates, to such of the sons of the testator's

Observations
upon *Spencer*
v. Duke of
Marlborough.

children *as were born in his lifetime*, and limiting estates-tail to their issue,) the Power might not have been held good, *pro tanto*, in the event of its being so exercised, in accordance with the Rule, as to ordinary Powers, to be presently mentioned.

But, it is to be remarked, that a *general* Power will not be deemed void, as tending to a perpetuity, because it is itself limited in exercise of a previous general Power, and, so, prolongs the period of the vesting of an estate under the first Power. (n) It has before been shown, that general Powers are to be regarded as tantamount to the absolute ownership; and it is clear, that, as far as respects any question of remoteness, there would be no objection whatever to an indefinite succession of general Powers, although the estates ultimately appointed, take effect by reference to the original Power. A *particular* Power, created under an exercise of a general Power, would, as it should seem, be within the spirit of the Rule against Perpetuities, and it, would, consequently, be necessary, in executing it, to appoint interests, which would have been valid, if expressly limited at the time of the creation of the particular Power.

General Power, created by exercise of previous general Power, not void, as tending to a perpetuity.

2. A particular Power may embrace objects of any degree of remoteness; *i. e.*, such a Power will not be void, because it attempts to authorize an appointment, to persons, not necessarily born, or the creation of interests, not necessarily vested, within the fixed boundaries of perpetuity. (o) The Power itself not giving any right, or creating any definite interest, no danger ensues, from the range of choice or selection extending to objects, whom the law would not allow to participate in an express gift. The possible exercise of the Power, in favor of such objects, only answers to the chances of abuse, which attend the power of dominion, possessed by a person absolutely entitled, but which have never been supposed to justify the total deprivation

Not necessary, to restrict Powers to valid objects of gift.

(n) 1 Sug. Pow. 249, 250.

Jarm. Wills, 250. Burt. Elem.

(o) 1 Sug. Pow. 281, 499. 1 Comp. 273.

of that power, or to disallow its exercise within temperate limits. Did the rules of law require an exercise of the Power, in favor of every person answering to the description of the objects embraced by it, or did the conferring a Power of appointment among a class of persons, operate as an implied gift to all the members of that class, in default of the exercise of the Power, arguments would exist, against extending a Power, to persons who could not legally participate in any *direct gift*, contemporaneous with, or made instead of, the Power. The security against the violation of the laws of remoteness, consists in the very discretion and latitude of choice, with which the donee of the Power is invested, by it, and in the failure and nullification of his dispositions, consequent upon an abuse of that discretion.

It is a result of this rule, that a Power may be given to a person, to appoint among children, grandchildren, or other issue; (p) although it will be construed to extend to issue in any degree. (q) And it should, even, seem, that there would be no objection to a Power of appointment, exclusively among a class of issue, (as, children of children unborn,) none of whom could be included in any express unrestricted limitation, if made at that time, but who might come *in esse* during the life of the donee of the Power, or within twenty-one years afterwards, and who might, therefore, take under any appointment by him, which should be, in terms, restricted to all issue born within the allowed limits.

3. But, although there is no necessity, to confine the *objects* of a Power, to those who might be legally included in an express gift of the same date, it is a long-established rule, that no estate or interest can be limited under a particular Power, which would have been too remote, if limited in the deed or will *creating the Power*. (r) The office of discrimination belongs to the donee of the Power; and, if

No estate can be limited under a Power which would be too remote if originally created instead of the Power.

(p) *Routledge v. Dorril*, 2 Ves. jr. 357.

(q) 1 Sug. Pow. 499.

(r) 1 Sug. Pow. 498. 1 Jarm. Wills, 248.

properly discharged, by the appointment of interests which would have been valid in the original instrument, the circumstance, that the Power embraced other objects, too remote, will not affect the appointment; but if the appointment extend to persons, or create interests, beyond the boundaries of perpetuity, as tested by their insertion in the instrument creating the Power, the appointment fails. Thus, if A. have a Power of appointment among the issue of B., and he appoint, to all the children of a son of B., who was unborn at the date of the instrument creating the Power, the appointment is bad; because the grandchildren of B., comprised in it, will not necessarily be born, within the period of a life in being and twenty-one years, computed from the date of the original settlement. (s)

4. But, if the appointment be, to such of the children of B.'s son, as shall be born during the life of the donee of the Power, or within twenty-one years from his decease, or before the expiration of twenty-one years from the decease of any other person, or the survivor of any number of persons, living at the time of the creation of the Power, it will be entirely free from objection, because such a limitation would have been valid, if contained in the original settlement or will. (t) And so, if the appointment be, to the children of B., (he having none when the Power was created,) on their attainment of the age of twenty-five years, or other age above majority, it will be void, as too remote, inasmuch as, under such a limitation, if inserted in the deed creating the Power, the vesting of the interests of the children might have been suspended, for a longer period, than a particular life or number of lives in being, and twenty-one years. But, if, by the appointment, the attainment of the required ages, by the children of B., be confined to take

But, if vesting of interests created by appointment expressly restricted to proper period, it is good.

(s) *Robinson v. Hardcastle*, 2 Bro. denell v. Elwes, 7 Ves. 382.
C. C. 344. *Bristow v. Warde*, 2 Ves. (t) See 1 Jarm. Wills, 249; 2 Sug.
jr. 336. *Routledge v. Dorril*, ib. 357. Pow. 286.
Crompton v. Barrow, 4 Ves. 681. *Bru-*

place within the legal limits of remoteness, computed from the taking effect of the original will or settlement, it will be unobjectionable ; as such restriction on the happening of the specified event, in itself too remote, would have sufficed to restrain its tendency to a perpetuity, if inserted in the instrument creating the Power. It will be observed, that, wherever the appointment is to the grandchildren or remoter issue of the person, in favor of whose issue the Power was created, and the birth of the issue, to take under the appointment, is restricted to the period of twenty-one years after the expiration of any life or lives, the vesting of the interests of the issue must not be postponed *beyond their birth*, as the whole period of the perpetuity-boundary is absorbed by the contingency which surrounds the objects of the gift. If, therefore, it be desired, to suspend the vesting of the shares of the issue, till their majority, care must be taken, to provide, that the issue, who are included under the appointment, shall be born, during the life of the donee of the Power, or during the lives of any persons, living at the time of the creation of the Power, and the life of the survivor.

It is true, that the terms, in which the rule, as to the interests which may be created under appointments, is sometimes (u) stated, declare, that an appointment to the issue of a person, unborn at the time of the creation of the Power, is, *in every case*, absolutely void, without reference to the birth of such remoter issue being restricted to happen within the legal period. But, this view of the doctrine, it is conceived, proceeds, rather, from a recollection of the manner, in which, limitations to the children of unborn persons are, for the most part, made, (such gifts being, generally, unconfin ed in point of time,) than, from any impression or consideration of the essence of the question as to the remoteness of such limitations, which is, whether they may possibly transgress the boundaries of perpetuity. If, then, by providing,

(u) *Butler's n. to Co. Litt.* 271 b, n. iii. 4. *Powell's n. to F. Ex. Dev.* 349.

that the issue, to whom the appointment is made, shall be born within the fixed limits of remoteness, computed from the time of the creation of the Power, all possible tendency to a perpetuity, in the gift to them, be obviated, it is difficult, to imagine, upon what grounds, such an appointment can be considered too remote. (v) Were the doctrine of a *possibility upon a possibility* of recognised force, in such a case, the absolute condemnation to invalidity, of all gifts to the issue of persons unborn, would not be entirely without foundation. But, that doctrine is generally admitted to have no authority in regard to such limitations: and, were it otherwise, the effect of the application of such a doctrine, would not be, to prove the limitation invalidated by it, void *for remoteness*; which is a question of law, entirely distinct from the old Common law notion of double possibilities, and was, moreover, little known or understood, at the period, when the latter had all the force, which fanciful and ingenious lawyers could give it. There seems no ground, therefore, for doubting, that every limitation in an appointment, whether, to the issue of persons unborn at the time of the creation of the Power, or not, which is so made, that it must vest, if at all, within any life or number of lives, *in esse* at the taking effect of the original will or settlement, and twenty-one years afterwards, is within the legal boundaries of remoteness, and, consequently, valid. (w)

! A question seems to arise, as to how far an appointment
; would be good, if made to the child of a person unborn at
the time of the creation of the Power, *living at the date of*

Appointment
to child of
child unborn
at time of

(v) *Vide supra*, pp. 420, 421.

(w) It is, also, sometimes said, (see judgment in *Routledge v. Dorril*, *ubi supra*; *arguend.* *Jesson v. Wright* 2 Bligh, 1; 1 Sug. Pow. 499;) that an appointment will be good, if it is confined to *issue living at the decease of the donee*; thereby giving rise to the inference, that, if extended to issue born afterwards, (although within

twenty-one years,) the appointment is bad: but it seems impossible, to support an appointment, to children of unborn children, living at the decease of the donee of the Power, by any argument, which does not equally substantiate an appointment, to issue born at any time within the extreme limits of remoteness.

creation of Power, bad, although grandchild specifically named in appointment.

the appointment, and specifically named in it. The difference, between such an appointment, and those before illustrated, is, that the frame and tenor of the appointment, from the nature of the case, do not supply that restrictive protection from the violation of the Rule against Perpetuities, which would have been necessary, were the limitations incorporated into the instrument creating the Power, in lieu of that Power, and which is ordinarily necessary in every *appointment*, made to an *unascertained class* of issue, the children of a person unborn at the time of the creation of the Power. Supposing, the gift to be to the first, second, or third grandchild, it is evident, that no such limitation could have been inserted in the deed creating the Power, unless it were provided, that the object of the gift should come *in esse*, within some life or lives in being and twenty-one years. The fact, that, at the time of the appointment, such grandchild has actually come in esse, within a life in being, cannot be regarded, in reference to the question of the validity of the appointment; as the limitation must be considered, in all respects, as if it had formed part of the original settlement, and, at the time of that settlement, it could not be predicated, with certainty, that any grandchildren would be born within the boundaries of legal remoteness. It seems, therefore, an inevitable conclusion, that a gift, such as that alluded to, must be treated, as void for remoteness, although, in fact and reality, the Rule against Perpetuities is not violated by it.

Appointment bad, also, when made to child of child unborn at creation of Power, although latter be dead at date of appointment.

The same conclusion must, also, be arrived at, with respect to an appointment, to the children of a child unborn at the time of the creation of the Power, when that child *dies previously to the appointment*, and when, therefore, *according to the course of events*, all objection, on the score of remoteness, to the appointment, is, in fact, precluded; although, as such a gift would have been void, if originally limited, instead of the Power, it is clearly insupportable.

When Power

5. Where the Power is created by will, the time, from

which to compute the period of perpetuity, in reference to the validity of the appointment, is, the death of the testator, when the will is consummated; and, where the Power is limited by deed, the computation commences at its date. (*x*) It follows, therefore, that, in the case of a Power of appointment, among the issue of a person, created by will, if a child be born, after the date of the will, but, in the lifetime of the testator, an appointment may be made to the issue of that child, without any restriction, in regard to the time of the birth of such issue: the child born in the testator's lifetime standing in the same situation, in reference to the limitations under the Power, as a child born at the date of the deed, where the Power is created by deed. But, it must be observed, no distinction exists in regard to the mode of the *execution* of a Power; (*y*) the criterion, in every case, being, the validity of the limitations in the appointment, if, and considered as, inserted in the deed or will creating the Power.

created by will, computation made from death of testator; when, by deed, from its date.

6. Where a gift under a Power extends to persons, or creates interests, not within the line of perpetuity, and the part or proportion of the subject of the gift, in respect of which there is excess, cannot be separated from that, which is well appointed, or, in other words, where every part of the appointment is made uncertain by the excess, or is involved in the same remote contingency, (*z*) in such case, the appointment wholly fails, and the property comprised in the Power, cannot be given to those objects, to whom it might have been legally appointed. (*a*) Thus, in a well-known case, (*b*) personal estate was settled, on marriage, for the husband, for life, then, for the wife, for life, then, to and among all and every the children and grandchildren or issue of the husband and wife, in such shares, under such

Appointment, embracing objects too remote, wholly void, if shares of valid appointees rendered uncertain by excess.

(*x*) 1 Sug. Pow. 498. *Butler's* 371.

note to Co. Litt. 271 b, n. iii. 4.

Powell's note to F. Ex. Dev. 364,

371, 372.

(*y*) *Powell's* note to F. Ex. Dev. 356.

(*z*) Burt. Elem. Comp. 273.

(*a*) 2 Sug. Pow. 70.

(*b*) *Routledge v. Dorril*, 2 Ves. jr.

restrictions, at such times, and in such manner, as they or the survivor should appoint, by deed or deeds, or by will, and for want of appointment, to all and every the children and grandchildren or issue, living at the decease of the survivor, equally, payable at twenty-one or marriage; if but one, to that one : and it was held, that an appointment to any issue not living must be restrained to twenty-one years after lives in being at the creation of the power, and that, *otherwise, the appointment was void, even as to such as came in esse* within those limits.

The ground, on which the excess of a portion of the appointment is considered to vitiate the whole of it, is, that it cannot be declared, with certainty, how the dispositions of the appointor would have been regulated, had he been aware of his inability, to extend them to some whom he has included in his gifts. And, moreover, if the limitation under the Power be read as inserted in the deed creating the Power, it is evident, that, where a part of the appointment fails for excess, the whole must be involved in its fate, because such failure implies, that all the interests created were not so given, as necessarily to vest within the perpetuity-line ; and we have before seen, that, wherever such is the character of direct original limitations, they are wholly void for remoteness, notwithstanding actual events might enable some, or, even, all, of them, to take effect within the required period. But,

Secus; if excess of appointment can be ascertained.

7. If the portion of the appointment, which exceeds the boundary of perpetuity, be definite and ascertained, or can be rendered so, (for, *id certum est quod certum reddi potest*,) and can be separated from that, in respect of which there is no excess, then, it should seem, those objects of the Power, in whose favor there is a valid appointment, may take the shares or interests destined for them, and the residue of the property, subject to the Power, will devolve, as unappointed ; in other words, the appointment will be good, *pro tanto*. (c)

Thus, it has been said, (cc) if property should be appointed, between the parent, capable, and his children, incapable, in equal moieties, it seems clear, that the parent would be entitled to his moiety. In such a case, the two moieties may, as regards any question of remoteness, be considered, as distinct funds or properties; and, in that view, it is plain, remoteness in the gift of one moiety can, in no way, affect that of the other. If, however, the nature or extent of the shares of the objects, capable, depend upon the number of persons answering the description of the class, incapable; that is, if the whole property is to be distributed between all the appointees, in *aliquot* parts; then, it would seem, that the valid appointees could not take the shares, to which they would have been entitled, upon a division, if the whole appointment had been valid. Thus, if the appointment is made to persons, valid objects of the Power, living and ascertained, and to a class of persons, embracing objects too remote, there seems no reason to suppose, that the specified appointees could take their proportion of the appointed property, although they might have done so, had a specific share been allotted to them, separately and distinctly. Such a case is materially different from that, of an appointment to objects of the Power, all capable, and to persons, *strangers to the Power*, in distributive shares, where it seems perfectly allowable, that the appointees, who are objects of the Power, should take the shares, to which they would have been entitled, upon the supposition of the whole appointment being good, notwithstanding the invalidity of the rest of the appointment, (d) for such invalidity arises from the extension of the appointment, to persons, *not objects* of the Power; and the gift to whom is, therefore, simply nugatory; and not, from the *remoteness* of persons who *are* objects.

In these cases, the simple rule on which the Courts

(cc) 2 Sug. Pow. 72.

See 2 Sug. Pow. 69, *et seq.*

(d) *Sadler v. Pratt*, 5 Sim. 632.

act, seems to be, that, when a Power is exceeded in the execution, in order to reject the excess, and let the appointment stand, *pro tanto*, it must be distinctly seen, what the person executing the Power had in view; and the Court must be satisfied, that, if he had rightly understood the extent of his Power, he would so have executed it. (e)

Where limitations are by way of particular-estate and remainder, remainder may be void, and particular-estate, good.

8. Where, under a Power, interests are given by way of particular-estate and remainder, (including analogous gifts of personal estate,) and the particular-estate is limited to a valid object of the Power, but the remainder is too remote, the appointment will not be wholly void, but, only, the gift in remainder. (f) In such a case, the interests, in respect of which there is an excess of the Power, being distinct and separable from the valid portion of the appointment, there is no reason for involving the primary limitation, in the remoteness of the remainder. The property, therefore, subject to the partial gift, remains unappointed, and devolves to those, who are entitled, in default of appointment, under the original will or settlement.

We have before seen, however, that, where the Power is executed by will, and the subject of it is an estate of inheritance, the doctrine of *cy-prés* may, if the remainder be limited to the issue of the tenant for life, and give estates-tail to them, be applicable, to bring the ulterior limitation within the proper boundary, by vesting, in the first appointee, an estate, corresponding to the measure and extent of the remainder to his issue. (g)

Limitation in appointment, postponed to one which is too remote, also void.

9. Where a gift under a Power is void, as too remote, a subsequent limitation, expectant on or engrafted upon it, is, also, void, although made to a valid object of the Power, and although the persons entitled under the void limitation

(e) *Hamilton v. Royse*, 2 Sch. & L. 315.

(f) *Adams v. Adams*, Cowp. 651.
Bristow v. Warde, 2 Ves. jr. 336.
Routledge v. Dorril, ib. 357. *Bru-*

denell v. Ethoes, 1 East, 442; 7 Ves. 382. *Butcher v. Butcher*, 9 Ves.

382.

(g) 1 Sug. Pow. 499.

entirely fail. (*h*) If there be persons, answering the description of those intended to take under the void limitation, there is no pretence for accelerating the remainder, for the latter is not to take effect, by the terms of the gift, until the failure of persons who are in existence. And, if there be a *failure* of the objects of the void limitation, the ulterior gift is equally incapable of being validated, because, by the Rule against Perpetuities, a limitation must be so framed, as *necessarily* to take effect within the fixed period, and the *accidental* failure of the persons intended to take under a prior remote gift, cannot remedy the original invalidity of the limitation expectant upon it.

10. But, where the contingency, upon which the ulterior gift under the Power is to take effect, is such, that the appointment may be regarded as one with a double aspect; that is, where there are, in fact, two distinct alternate limitations, one of which is dependent on a remote event, and the other, on one that is not so; the failure of the objects of the limitation which is too remote, will operate to give effect to the alternative contingency, in respect of which there is no excess of power. (*i*) As, however, this point will more properly call for consideration, in connexion with the general subject of limitations with a double aspect, as they are affected by the laws of remoteness, (*k*) no further reference to it is necessary, in this place.

But where there are alternative gifts, one being good, and the other, void, valid gift may take effect, if bad one fails.

11. Again, when there is an absolute appointment to valid objects of the Power, solely, in the first instance, and the appointor afterwards superadds restrictions to the gift, which, if carried out, would render it void for remoteness, the appointment will be held valid, and the void restrictive clause, rejected. (*l*) The particular discussion of this point

In case of remote restrictions on prior valid appointment, former rejected, and latter stands.

(*h*) 2 Sug. Pow. 73. And see *Routledge v. Dorril*, 2 Ves. jr. 357; *Alexander v. Alexander*, 2 Ves. sr. 640; *Robinson v. Hardcastle*, 2 T. R. 241; *Brudenell v. Elwes*, 1 East, 442; 7 Ves. 382.

(*i*) 2 Sug. Pow. 77, 78.

(*k*) *Vide infra*, ch. 21.

(*l*) 2 Sug. Pow. 79, 279. 1 Jarm. Wills, 257. 2 Prest. Abst. 164. See *Carver v. Bowles*, 2 Russ. & My. 301; *Kampf v. Jones*, 2 Keen, 756.

will, also, be more appropriate, when the subject, of which it is a branch, occurs for attention.

When *Power* confined to persons within prescribed limits, not necessary to restrict appointment to such objects.

12. Although, when a Power embraces objects, not necessarily within the perpetuity-boundary, an appointment to a class, including persons too remote, is void, as a whole, yet, if the Power authorize an appointment to persons *capable within the Rule against Perpetuities*, only, an appointment, extending to persons too remote, and, therefore, *strangers to the Power*, will be good, *pro tanto*; the appointment, so far as regards the shares of the remote appointees, being entirely nugatory.^(m) Thus, if a Power be given to A., to appoint among his children, grandchildren, and other issue, as he shall think fit, such issue being born in his lifetime, or within twenty-one years after his decease, an appointment to the whole class of the children of an unborn child of A., without limiting the time of the birth of such issue, in accordance with the terms of the Power, will be void, only, as to such of the grandchildren as are not born within the required period, but, will be valid, as to all such members of the class, as are objects of the Power, that is, such as are within the limits prescribed by the Rule against Perpetuities. The remote appointees not being objects of the Power, the remoteness affecting the gift to them, can no more invalidate the rest of the appointment, than would the introduction into it of the names of persons, not forming a portion of the class, to which the valid appointees belong, and, in reference to whom, no question of remoteness could arise. The limits of the Power and the Rule against Perpetuities are, in fact, co-extensive; and the consideration of the effect of any remoteness in the invalid gift is excluded, by its not being within the authority conferred by the Power.

Whether, indeed, in a case such as that supposed, the members of the class *included in the Power*, would suc-

^(m) 1 Jarm. Wills, 250. See in *Church v. Kemble*, 5 Sim. 525; and in *Kampf v. Jones*, *ubi supra*.

ceed to the whole property, or, only, to such shares as they would have been entitled to, upon a division of the property, had the entire appointment been valid, it may be difficult to say. It may be contended, on the one hand, that the appointment being *to a class*, embracing objects not within the Power, it must be read, as confined to such members of the class as an appointment might be made to, under the Power; while, on the other hand, it may be urged, that the *animus* of the appointor was, to give each member of the class named in his appointment, a proportionate share, equivalent or corresponding to his position relatively to all the other members, and that, therefore, any *enlargement* of that share, by distribution of the whole property among a portion only of the class, operates adversely to the *intended* exercise of the Power. In favor of this latter view, is the analogy deducible from what would be the undoubted construction, in reference to an appointment to several persons, *ascertained and by name*, some of whom were objects of the Power, and some, strangers to it, when each valid appointee would, unquestionless, take a share, proportioned to the aggregate number of the appointees, although some of these were strangers to the Power. An adverse consideration is, that, by the construction in question, effect cannot be given to the appointment, until the number of the individuals, comprised in the class intended to take under it, is determined; which will necessarily exceed the period of the ascertainment of the *valid* appointees (and, therefore, the perpetuity-line), whenever the parent of the class of issue intended to take, outlives the term of twenty-one years from the determination of the life or lives originally named. (n)

(n) This difficulty seems to have escaped the attention of Mr. Jarman, (1 Treatise on Wills, p. 250,) when he says, "an appointment to a more extensive range of issue," than that included in the Power, "would be

good, *pro tanto*." This assumes, the proportion of those who can take under the Power, to the aggregate numbers of members of the common class, to be ascertained. But, how can it be ascertained, until all those members

Of course, when, by the death of the parent, whose issue are intended to take under the appointment, prior to the expiration of the period limited by the Power, the class of objects of the Power, and of appointees, consists of the same persons, the appointment is wholly good, and the property becomes divisible amongst all the parties named in the appointment.

The distinguishing feature to be noticed, in cases of the confinement of the Power to objects within the line of perpetuity, is, that all necessity for restricting the appointment, in terms, to persons not too remote, is removed, as, from the nature of the case, only that portion of it, which is made to such persons, is in conformity with the terms of the Power, and, therefore, valid.

It must be remarked, that no judicial authority is to be adduced, in support of the views advanced under this branch of the subject of Powers, as they are affected by the provisions of law against Perpetuities; but, it is conceived, the principles on which they rest, will sufficiently recommend them to reception. (o)

have come *in esse*? And, if they will not all necessarily be born within the perpetuity-boundary, (which, *ex hypothesi*, in the case,) where is the security against the violation of the Rule?

(o) In *Kampf v. Jones*, *ubi supra*, where an instance of the class of Powers, here considered, occurred, there was an absolute appointment, to a daughter of the appointor, with a subsequent qualifying clause, directing a settlement on the appointee, for life, for her separate use, with remainder, to the issue generally: and Lord Langdale, M. R., held, that the absolute gift ought to have effect, "subject to the limitations which were within the power, and free from

the others." Now, it seems clear, that all the issue of the appointee, born in the life of the appointor, were within the power; and it should appear, therefore, that the restrictive gift was good as to all such issue. Notwithstanding, however, his lordship used the general words, before mentioned, as to the restrictive clause, (which might, possibly, be intended only to refer to the trust for separate use,) it can no where be collected from the decision, whether the learned judge had in view any such partial operation of the qualifying gift, with reference to the issue of the appointee; although his expressions fully admit of such a supposition.

CHAPTER XXI.

OF THE RULE AGAINST PERPETUITIES, AS IT AFFECTS LIMITATIONS ON ALTERNATIVE CONTINGENCIES, OR, CONTINGENCIES WITH A DOUBLE ASPECT.

WE have seen, that there is a general rule, in the nature of an adjunct to the Rule against Perpetuities, that every limitation of a future interest in property, must, in its *original form*, be such, that it will *necessarily* vest, if at all, within the legal boundaries of remoteness; and that, in deciding on its validity, in reference to the perpetuity-rule, no regard whatever can be had to actual events, although such, as might have been antecedently contemplated, as the contingencies, on which to suspend the limitation.

But there is one exception to this Rule; in some degree, founded on the Rule itself. It is, that, where a limitation is made, to take effect on two alternative events, one of which is too remote, and the other, valid, as within the prescribed limits, although the gift is void, so far as it depends upon the remote event, it will be allowed to take effect, on the happening of the alternative one. (*p*) Thus, if there be a gift, to an unborn child of a person *in esse*, when he shall attain twenty-three years of age; and in case the child shall not attain that age, *or in the event of no child being born*, then, over. The limitation, regarded as depending on the event of the unborn child not attaining twenty-three, is, manifestly, void, for remoteness; but there is no such

Limitation on alternative events, one of which is good, will take effect, if that happens.

Illustrations of the doctrine.

(*p*) See 1 Jarm. Wills, 244.

objection to it, viewed as a gift, to take effect in case a person *in esse* shall die without a child, as that event must happen, if at all, at the expiration of a life in being.

So, if there be a limitation to A., and his heirs, and if B. die without issue, or, having such, *if all such issue die under the age of twenty-one years*: the gift-over, in the event of the general failure of B.'s issue, is too remote; but the alternative gift, to take effect in case of their being issue, and of their death under twenty-one, is free from objection, as the period of a life in being and twenty-one years will ascertain, whether the limitation shall take effect, or not. (g)

Again, a limitation to A., for life, with remainder, to his unborn son, for life, with remainder, in contingency, to vest on the death of the unborn child, or, *on the death of A., without leaving such child*, would be valid: for, although the ultimate remainder is too remote, so far as its vesting is postponed to the decease of the unborn tenant for life, and would, therefore, fail, if such tenant for life came *in esse*; yet, it will be good, if A. die without leaving any child, at the time of his decease.

And, further, if a limitation were made, to an unborn child of A., who should acquire some qualification, not necessarily to be attained by him during minority, with a gift-over, in default of a person, answering the requisite description, or, *in case of no child of A. being born*; the ulterior limitation would be too remote, so far as its operation depended on the non-acquisition of the prescribed qualification, by A.'s child; but it might very properly take effect, in the alternative event of A.'s not having any child.

And, yet again, (to mention but one other illustration,) the before-noticed case of a gift of personalty, to one, for life, and, afterwards, to his issue, by purchase, with a limitation-over, in default of issue of the legatee for life, is another instance of limitations of this kind, although somewhat dif-

(g) See *Beard v. Westcott*, 5 Taunt. 393.

fering from the previous examples: there, the gift-over takes effect, only, in case of a failure of the objects of the preceding limitation, and by way of substitution for it; and it is wholly void, in the event of the first interest vesting. (r)

These are called limitations with a double aspect, or, more properly, limitations on a *contingency with a double aspect*; i. e., they contemplate two events, distinct from each other, on either of which, the gift is intended to take effect, and the remoteness of one of which, therefore, in no way affects the other, in case of its being actually realized. And gifts of this kind so far differ from all other limitations, in the construction to be put upon them, in reference to the laws of remoteness, that the validity of them *depends entirely on subsequent events*: if the *event* be such as gives operation to the remote contingency, or, in other words, decides, that, of the two contingencies, that (if either) happens, which is without the perpetuity-line, then, the limitation is wholly void; if, on the other hand, the actual state of things correspond to that contemplated by the alternative (valid) branch of the contingency, the gift takes effect. The void contingency may, generally, (except in the class of cases secondly above illustrated) be styled, that which assumes the existence of the *object* of the limitation, but refers to the non-attainment of some age or other qualification, which enters into and constitutes the remoteness of the gift: the valid contingency, for the most part, contemplates the *failure* or *non-existence* of the object, in reference to whom the remoteness arises, antecedently to any consideration of his answering the description, or possessing the qualification, required by the gift.

Nature and operation of the rule.

Having thus given a short outline of the leading features of limitations on double contingencies, as they stand affected by the Rule against Perpetuities, it will be proper, to afford a closer view, by a brief notice of some of the autho-

Authorities establishing it.

(r) *Vide supra*, p. 367.

rities, which have contributed to the present form and character of the doctrine.

In one case, *(s)* a term of one-thousand years was created, in a marriage-settlement, upon trust, that, in case the settlor should happen to die without *leaving* issue male of his body, on the body of his wife, or, if all the issue male between them should happen to die without issue, and there should be issue female of the marriage, who should respectively attain the age or ages of eighteen years, or be married, then, from and after the death of the survivor of the settlor and his wife, without *leaving* issue male, or, in case, at the death of the survivor, there should be issue male, then, from and after the death of such issue male, without issue, the trustees should raise the portions therein mentioned: there was a failure of issue male of the marriage, during the lifetime of the mother, who survived the settlor, leaving daughters, who claimed the portions secured to them under the trusts of the term: it being argued, that these trusts were void, as limited on too remote an event, *i. e.*, the dying of the issue male of the marriage, without issue, generally; it was held, that the first part of the contingency was good, *viz.*, "in case the settlor and his wife should happen to die without *leaving* issue male;" and, as that happened in fact to be the case, the Court would not enter into the consideration, how far the other branch of the contingency might have been supported, which could only come in question, in case the issue male had survived both the parents.

Again, in another case, *(t)* the same point was decided upon a limitation under a *Power*. A *feme-coverte*, by her will, appointed property, to her son, C. B., for life, and after his decease, to his wife and children, but in case he should die *without leaving a wife or child him surviving*, the testatrix

(s) *Longhead d. Hopkins v. Phelps*,
2 Sir W. Bl. 704.

(t) *Crompte v. Barrow*, 4 Ves. 681.

And see Lord Kenyon's observations,
on that case, in *Brudenell v. Ettes*, 1
East, 450.

bequeathed the property, to her daughter, F. J.; the bequest, to the wife and children of the son, being void, both as an excess of Power, and as too remote, with reference to the deed creating the Power, it was argued, that the ulterior gift to F. J. was, also, void; but it was held, that there were two alternatives in the appointment, and that, if C. B. left neither wife nor children, the limitation-over, being to a good object, should take effect; if he left a wife, or children, it would not take effect. (u)

And so, also, in a well-known case, (v) stock and monies were bequeathed, to W. R. R., for life, and after his decease, to the child or children of W. R. R., who, being a son or sons, should attain the age of twenty-five, or, being a daughter or daughters, should attain that age, or be married, with consent; and, in case W. R. R. should die *without leaving issue living at the time of his decease*, or, leaving such, they should all die before any of them should attain twenty-five, if sons, and, if daughters, before they should attain such age, or be married, as aforesaid, then, to the brothers and sisters of W. R. R., on their attaining twenty-five, if a brother or brothers, and, if a sister or sisters, on such age or marriage, as aforesaid: W. R. R. died without leaving issue. Here, we perceive, the gift-over was void, in itself, as extending to all the brothers and sisters of W. R. R., living at his death, while the vesting of their shares was postponed till their ages of twenty-five years; and so it was held: but the point to be noticed in this place, is, that it

(u) It will be observed, that, the vesting of the alternate gift, in the event of a failure of the wife and children of the son, (who was unborn at the time of the creation of the Power,) being necessarily postponed till his death, the ulterior limitation was too remote, in reference to both contingencies. But this oversight on the part of the Court does not affect the force of the judg-

ment, as an authority in favor of the applicability of the doctrine of double contingencies, to limitations under Powers. See *per Lord Kenyon*, 1 East, 450; 2 Sug. Pow. 77, 78; 1 Jarm. Wills, 246.

(v) *Leake v. Robinson*, 2 Mer. 363. And see *Cambridge v. Rous*, 8 Ves. 12; and observations thereon, 1 Jarm. Wills, 247.

was nowhere urged, that, in reference to the particular contingency which had happened, and on which the limitation-over was to arise, it was too remote; although, had the son left issue, the *event*, on which the limitation was to take effect, as well as the objects of that limitation, would have been too remote.

Necessary, that valid and remote contingencies should be distinct, or that that expressed, be separable.

But this mode of construction is only admissible, (except in the instance of the last of the illustrations formerly given,) when the contingencies are *capable of being divided*, so that they may be considered as *alternate* or *concurrent*, the one to operate, only, in case the other fails of taking effect at all. (*w*) Thus, in a case, (*x*) cited in a preceding Chapter, where there was a devise, to the first son of the testatrix's grandson, T. P., that should be bred a clergyman and be in Holy Orders; *but in case the grandson should have no such son*, then, to T. M.: it was contended, in support of the ulterior devise, that there were three contingencies on which it depended; the first, that of T. P. having a son; the second, of that son being bred a clergyman; and the third, of his being in Holy Orders; and that, if either of these contingencies were good, and the event never happened, the devise-over to T. M. might take effect: and it was, also, said, that, supposing the prior devise to be bad, there was nothing to render void, the devise to T. M.; for the limitations in the will were alternate; if T. P. should have a son in Orders, to take as devisee, T. M. would be entirely excluded. But the Court of C. B. held, that the first devise to the son of T. P. was void, from the uncertainty, as to the time when such son, if he had any, might take Orders; and that the devise-over to T. M., as it depended on the same event, was, also, void; for the words would not admit of the contingency being divided. It will be observed, that, in this case, although the contingency

(*w*) See *Fussell's* note to F. Ex. Dev. 156.

(*x*) *Procter v. Bishop of Bath and Wells*, 2 H. Bl. 358.

was, doubtless, intended to embrace, as well, the event of T. P. having no son at all, as that, of such son not being in Holy Orders, yet, the word, "such," connected it too closely with the particular qualification, required to be possessed by the son, to allow of the gift-over being referred to any other event; and, as the contingency contemplated was not properly restricted, the ultimate limitation necessarily failed.

In reference to this point, the late Mr. *Powell*, in his edition of Mr. *Fearne's* treatise on *Executory Devises*,^(y) has some very valuable observations; which also accord with the views entertained by his learned author, upon a case, whereon he delivered his sentiments. Mr. *Powell* puts the supposed case, of a devise, by A., to his wife, for life, and after her death, to the child she was then *enciente* with, if it should attain the age of twenty-five years; and if *such* child should die before the age of twenty-five, then, over; (z) and, upon this, asks, whether the (supposed) subsequent event of the wife not being *enciente*, and no child being born, could give effect to the Executory devise. Among the learned writer's observations, are the following: (a)—"Possibly, it might be contended, in support of a devise so constructed, that, as the event of the wife's not being *enciente*, equally included the *two* contingencies of her not being *enciente* at all, and her being *enciente* of a child, who should, however, not answer the description, the limitation-over, upon the *former* event, in case it happened, not being too remote, might take place; for where an Executory devise is limited on two contingencies, one of which is within the requisite limits, it may take effect, if *that* con-

Mr. *Powell's* reasoning on this point.

(y) P. 457, n.

(z) It must be observed, as to the supposed case, to which Mr. *Powell's* remarks have reference, that, as a child *en ventre sa mere* is considered, as, to all intents and purposes, a person *in esse*, the limitation to that child,

on attaining twenty-five, could not be too remote; nor, of consequence, would be the gift-over: but this does not affect the force of the doctrine maintained in the passage quoted in the text.

(a) Pp. 457—459.

tingency happens, as in the case of *Longhead v. Phelps*. (b) In respect to this, it seems, that, if the testator had *expressly* distinguished *between the two contingencies*, by mentioning both of them *disjunctively*, as in the case last mentioned, its validity would have been unimpeachable, on the happening of the *first* of them, and the devisee-over would have been entitled accordingly; indeed, had the devisee-over been, 'in case the wife should have no child,' it would have been confined to proper limits, and have taken effect, if that event happened: but the words, 'if such child,' are, by force of the word, '*such*,' as clearly equivalent to, such child who should *die before the age of twenty-five*, as if those very words had been actually repeated; under which state of the limitations, there appears nothing to distinguish the case supposed, from the common case of an Executory devise, after a person dying *without issue*, or for *default of issue*, where, though the event described, actually includes the *two* distinct contingencies, of the person *never having* or *leaving* any issue, which would clearly be within the legal limits, as well as any *future extinction* of issue, once had, still, it has been established by repeated decisions, that the devise shall be equally void, whether there happens to be any such issue, or not, agreeably to the doctrine laid down, as clear law, in the case of *Goodman v. Goodright*, (c) as well as to the grounds of the decision in the case of *Longhead v. Phelps*, which proceeded on the express distinction, *there* made by the testator, between the two events, in the *disjunctive* provision for them: and though cases might be put, where the validity of an Executory devise may be originally contingent, and its effect depend upon the *future existence* or *ascertainment* of the person, to whom the estate is antecedently limited, yet, they were cases of that sort, in which the existence or ascertainment of the prior contingent devise, must *necessarily*, in any

(b) *Vide supra*, p. 504.

(c) 2 Burr. 873.

possible event, be ultimately decided within the period of a life in being, or twenty-one years after; as in a case of a devise of a chattel interest, to the first son of B., and the heirs male of the body of such first son, and in default of such issue, remainder-over; where the period for the ulterior limitation taking effect is necessarily restricted to the time of B.'s death, when it must be determined, whether he will have any son, or not; for if he should have a son, that son would take *absolutely*, in *total exclusion* of the limitation-over."

The result of the foregoing considerations, therefore, seems to be, that, wherever the valid alternative contingency is left to implication, merely, or, wherever it is not so expressed, as to be separable from the remote contingency, but is, rather, embraced by this, the limitation will be void, as depending upon an event which is too remote, and with which, there is no event alternate or concurrent, that may give effect to the limitation.

In regard, however, to the case of a gift of personalty, to take effect in the event of the failure of a preceding limitation to an unborn person and the heirs of his body, (which is the last of the instances above illustrated,) the contingency is rather implied, than otherwise; or, perhaps, more strictly, the contingency which is expressed, receives a particular construction, necessary to exempt it from all objection of remoteness. (d) Indeed, this kind of limita-

Distinction upon this point, as to one instance of limitation with a double aspect.

(d) "If a term for years be bequeathed, to A., for life, and after his death, to his first and other sons unborn, successively, and the heirs of their bodies, and on failure of such issue, to B., for life, and after his death, to his first and other sons, successively, and the heirs of their bodies; these limitations to B., and his first and other sons, as depending on and to take effect after the failure of the

estates of the first and other sons of A., (being merely chattel interests, and, consequently, not creating estates-tail,) are too remote, and, therefore, void. But the law, foreseeing, that there may not be any child of A., considers the limitations to B., and his first and other sons, as intended to take effect, in the event, that there should not be any child of A.; and it construes the limitation in the same

tion is only mentioned in this place, on account of its similarity to proper limitations on double contingencies, in the particular point of its validity depending on the course of events subsequent to its creation.

manner, as if penned in these terms; ternative, that there shall not be a
and the limitation is good, in the al- child of A." 2 Prest. Abst. 171.

CHAPTER XXII.

OF THE RULE AGAINST PERPETUITIES, AS IT AFFECTS LIMITATIONS, WHOSE POSSESSORY ENJOYMENT IS POSTPONED BEYOND THE PERIOD OF VESTING.

It has been frequently observed, that the particular feature in limitations of future interests, with which the Rule against Perpetuities is connected, is, the time of their *vesting*, or, in other words, of their becoming interests, transmissible to the representative of the grantee, devisee, or legatee, and disposable by him. When they are so limited, as, necessarily, to attain this quality, within the legal period of remoteness, they are free from objection, in reference to the perpetuity-rule.

Rule against Perpetuities has reference to the *vesting* of limitations.

It follows, therefore, that, if the *vesting* of a limitation be confined to the prescribed limits, it is not invalidated by the circumstance, of *its taking effect in possession* being postponed beyond the boundary of perpetuity; for that suspension of the possessory enjoyment of the property, so far as it transgresses the boundary, will be void, and the possession, accelerated, by the virtual erasure of the clause of postponement from the gift. (e) As the suspension of the actual possession is not of the essence of the gift, the allowing that to defeat it, when, in other respects, complying with the requisites of the Rule against Perpetuities, would be a disregard of all principle and analogy, not more unnecessary, for the preservation of the integrity of the

And gift not void, therefore, because its possessory enjoyment is deferred to too remote a period.

(e) See 1 Jarm. Wills, 252, *et seq.*

Invalid clause
of postpone-
ment of
possession,
rejected.

Rule, than calculated to defeat the intentions of the author of the gift. By rejecting the *excess* of postponement, and, at the same time, giving full effect to it, up to the extremity of the allowed limits, and, withal, preserving unimpaired, the force and validity of the restricted vesting, the most equitable reconciliation is effected between the designs of the person, by whom the limitations are created, and the restrictions of the perpetuity-rule. Nor is there, upon principle, any ground, for invalidating the *whole* term of postponement, *extra* the period of vesting; for the latter being, solely, that which enters into the consideration of the question of remoteness in the gift, there is not the like objection to a separation of the eventual excess, from the valid portion of the term, which the rigid requirements of the Rule against Perpetuities present, in regard to the period of the *vesting* of a limitation. It follows, likewise, from these principles, that, whenever the time, during which the enjoyment is postponed, does not exceed the legal boundary, the possession will be accelerated, to no extent, although the vesting of the limitation may take place at a much earlier period.

Case of
Farmer v.
Francis.

To exemplify the doctrine under consideration :—In one case, (*f*) a testator devised the residue of his effects, to trustees, in trust, to pay the rents, to his daughter, A., for life, with remainder, to all her children, that should be living at the time of her death, equally amongst them, if more than one, to be divided, share and share alike, *when and as they should respectively attain the age of twenty-four years*, and to their respective heirs, executors, &c., for ever, to take as tenants in common, and not as joint tenants: a question arose, as to the remoteness of the devise to A.'s children; and it was held, in C. B., that they took equitable estates in fee, as tenants in common, by virtue of the residuary clause, and that they would have taken legal

(*f*) *Farmer v. Francis*, 9 Moo. 310; 2 Bing. 151.

estates in fee, but for the introduction of trustees. Here, we perceive, it was the period of *division* which was too remote; and not, the time of the vesting of the devise, which did not exceed a life in being at the date of the will. And so, again, in another case, (g) a testator gave the residue of his property, to his widow, during her life, and at her decease, to the eldest surviving son of A., *upon his attaining twenty-five*, (the trustees being directed, to apply the interest to his use, till his attainment of that age,) or, failing such issue male, to the daughters of A., *living at the decease of the last of such issue male*: the only son of A. died under twenty-five, in the lifetime of the widow, leaving two daughters of A., him surviving: and it was held, that, if there had been any son of A. living at the death of the widow, he would have taken a vested interest in the residue, though he had not then attained the age of twenty-five; and that, therefore, the gift-over of the residue, to the daughters of A., was not too remote, and that, in the events which happened, they, upon the death of the widow, became entitled to the residue.

Case of
Murray v.
Addenbrooke.

This distinction between the period of vesting, and the time of enjoyment or possession, in reference to the validity of limitations under the laws of remoteness, has given rise to much discussion, in cases of doubtful construction, upon the question, whether, where the possessory enjoyment of the property is postponed to a period, more remote than that allowed by the Rule against Perpetuities, the vesting is postponed, also, or whether it takes place, immediately, or at any time within the prescribed limits. In some instances, the gift, and direction for payment or distribution, are so closely connected, as to leave it doubtful, whether there is any gift, distinct from the clause fixing the period of actual possession, and whether, consequently, it can be supposed,

Of importance,
to decide,
whether
vesting is
postponed, or
enjoyment
only.

(g) *Murray v. Addenbrooke*, 4 Russ. 407.

General rules
as to the
vesting of
limitations.

that there is a vested interest, while there is a postponed enjoyment.

The authorities, to be cited, will be found, for the most part, perhaps, to establish this general conclusion:—that, although the time is mentioned as referring to the gift itself, unless it appears to have been fixed on by the donor, as the period, previously to which, no part of his bounty can attach to the donee, the gift vests immediately, and the time of payment or distribution, only, is postponed, not being annexed to the substance of the gift; but, if it appears, that the donor intended the period or contingency named, as a condition precedent, upon which alone the gift can take place, then, if such condition or contingency does not happen, the limitation never operates; and, of consequence, if the time or event specified be of too remote expectancy, the limitation wholly fails, whatever be the course of events. (A) It must be observed, further, that, as a general principle, the judicial construction of limitations always strongly inclines to their immediate vesting, unless there be a strong manifestation of a contrary intent, in the person from whom the dispositions move. The reason of this prepossession of the law, and its expounders, has been thus well stated by an eminent living judge: (i)—“The rights of the different members of families not being ascertained, whilst estates remain contingent, such families continue in an unsettled state, which is often productive of inconvenience, and, sometimes, of injury, to them. If the parent’s attaining a certain age be a condition precedent to the vesting estates, by the death of their parents before they are of that age, children lose estates, which were intended for them, and which, their relation to the testator may give them the strongest claim to. In consideration of these circumstances, the judges, from the earliest times, were always inclined to

(A) See 3 Bro. C. C. 473.

Wynford, in *Duffield v. Duffield*, 1

(i) *Per Best*, C. J., now Lord Dow & Clark, 311.

decide, that estates devised were vested; and it has long been an established rule, for the guidance of the Courts of Westminster, in construing devises, that all estates are to be holden to be vested, except estates, in the devise of which, a condition, precedent to the vesting, is so clearly expressed, that the Courts cannot treat them as vested, without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstances occasioning the doubt; and what seems to make a condition, is holden to have only the effect of postponing the right of possession."

General rules
as to the
vesting of
limitations.

A rule, auxiliary of the same construction, is, that, when either the interest or income accruing before the period of enjoyment, is given to the donee, or directed to be appropriated for his benefit, or, when the *corpus* of the gift is directed to be immediately severed from the general estate of which it forms a part, or must necessarily be so set apart, in order to answer the intermediate disposition of income, or, when there is a gift-over, in the event of the death of the donee before the arrival of the fixed period, or his attainment of the specified age, or *without leaving issue*, (as implying, that, in the alternative event, they would succeed, as representatives of the donee, and as giving the limitation-over the appearance of a *divesting* operation,) in all such cases, the presumption is strongly in favor of the immediate vesting of the gift. (*k*) It is *only* a presumption, however, to which these circumstances give rise, for the force of them all, is liable to be rebutted, by the plain exhibition of a contrary intention, in the maker of the limitations.

And so, also, the Courts are always strongly inclined, to construe devises or bequests of *residuary* estates, immediately vested, as the frequent consequence of a contrary

(*k*) See 1 Jarm. Wills, 733—767; 1 Rep. Leg. 161—249.

General rules
as to the
vesting of
limitations.

construction, is, intestacy, which is, of course, averse from the intentions of the testator. (*l*)

On the other hand, it may, in general, be said, that, where there is no gift, but in the direction for payment or distribution, and that direction attaches only in favor of persons, of a description too remote, in such case, as there is no antecedent gift, of which the enjoyment can be postponed, the limitation is necessarily tainted by any remoteness that affects the clause of transfer or possession, which is also the clause of gift.

The involved texture of some dispositions renders it, not unfrequently, difficult, to decide, whether there be any direct gift, antecedent to or distinct from the clause pointing out the time or contingency, at or on which the possessory enjoyment of the property is to commence. When such is the character of the dispositive provisions, the general partiality for vested interests will, ordinarily, suffice, to incline the balance of legal interpretation, in favor of the construction of an antecedent gift, and a subsequent direction for deferred enjoyment, or futurity of possession. But, it is impossible and unnecessary, further to pursue this subject: the distinctions which have been established are manifold; and several of the authorities are not easily reconciled with each other: it is, moreover, beside our present purpose, to do more, than show the consequences of remoteness in either the vesting or time of taking effect of gifts; the construction of which is to be referred to other principles, and is conducted upon totally distinct grounds.

The exceeding difficulty of framing a determinate rule, applicable to all cases of doubt, as to vesting and possessory enjoyment, has been instrumental, in supplying a numerous train of decisions, by examination of which, the importance of these cases of construction, in connexion with the opera-

(*l*) See 1 Jarm. Wills, 767.

tion of the Rule against Perpetuities, will be the better perceived.

It is to be observed, that, in determining the question of the period of vesting of a limitation, in reference to its validity under the perpetuity-rule, there is no real distinction, in point of principle, between cases, where the question has been, whether the limitation was too remote, and those, in which nothing but the time of vesting was in dispute, as between the person entitled under the limitation, and some one interested until or in default of its taking effect. The Courts do not regard the consequences of any rule of construction, which they may have established, as presenting any objection to its application, when clearly called for; and, therefore, the circumstance, that, by the laws of remoteness, the effect of applying any particular rule, in regard to the vesting of limitations, will be, the wholly defeating the donor's scheme of disposition, is of no weight in opposition to the application of that rule, if, in a case, in which the remoteness of the limitation did not come in question, it would have been undoubtedly admitted. (m)

These rules not departed from, because consequence may be, the invalidity of a gift, on ground of remoteness.

Authorities, therefore, upon the subject of the time of vesting of limitations, free from all suspicion of remoteness, are constantly made the basis of the application of a similar rule of construction, to cases, in which the invalidating of limitations, by reason of remoteness, is the grand object in view; and towards which, the question, as to the period of vesting, is only subsidiary or introductory. As, however, there is a sufficiency of authorities, of this latter description, to afford a complete illustration of the doctrines of law, upon the subject of the vesting and postponement of enjoyment of limitations, while, at the same time, subserving our present purpose, of elucidating their connexion with the Rule against Perpetuities, it will, perhaps, be proper, to confine our attention to this class of cases; referring, for a more

(m) *Jee v. Audley*, 1 Cox, 324. And see 1 Jarm. Wills, 253, 254.

extensive inquiry, to authors who have systematically discussed the subject.

We proceed, first, to ascertain the cases, in which limitations have been held *void* for remoteness, by reason of the construction of a *postponed vesting* having obtained.

Case of *Leake*
v. *Robinson*.

In *Leake v. Robinson*, (n) a testator gave certain real and personal property, to trustees, in trust for W. R. R., for life, and after his decease, to pay, apply, and transfer the same, unto and amongst the child or children of the said W. R. R., *who, being a son or sons, should attain the age of twenty-five, or, being a daughter or daughters, should attain that age, or be married*, with consent; and the trustees were authorized, to apply the rents, profits, and interest, or so much as they should think proper, for the maintenance of the said children, in the meantime: and it was held, by Sir *W. Grant*, M. R., that this was not a case, in which the enjoyment only was postponed, but, that the direction to pay, was the gift, and that that gift was only to attach to children who should attain twenty-five, and that, consequently, the bequest was void.

Case of *Bull* v.
Pritchard.

In the case of *Bull v. Pritchard*, (o) there was a bequest of property, to trustees, upon trust, to pay the dividends, to the testator's daughter, for life, for her separate use, and after her decease, to pay the principal, unto all and every her children who should live to attain twenty-three years of age, share and share alike, with benefit of survivorship, in case any of them died under that age; with limitations-over, in case there should be no such child or children, or, being such, in case all of them should die under twenty-three years, without lawful issue: and the trustees were authorized to apply the interest of each child's respective share, towards their maintenance, notwithstanding such child's share should not have become absolutely vested: the daughter had a child who died under age in the daughter's lifetime. Lord *Gifford*, M. R., held, that the

(n) 2 Mer. 363.

(o) 1 Russ. 213.

bequest to the children, and the subsequent limitations, were too remote. (*p*)

In *Palmer v. Holford*, (*q*) there was a bequest of 2500*l.*, Case of *Palmer*
v. Holford. stock, to trustees, in trust, to accumulate, and to transfer the accumulated fund, unto all and every the *children and child of C. T. H.*, (a person *in esse*,) *who should be living, at the expiration of twenty-eight years* from the testator's decease, other than an eldest or only son. Sir *J. Leach*, M. R., observed, that, if C. T. H. had children, born to him at any time within seven years from the testator's death, then, the vesting of the interests of such children, who were unborn at the death of the testator, would have been suspended for more than twenty-one years, and the gift was, therefore, too remote and void; and the gift-over, not being to take effect until after the same period, which was too remote, was necessarily void, also.

In *Vawdry v. Geddes*, (*r*) there was a bequest of the produce of the testatrix's residuary estate, in trust for her four sisters, for their lives, and a direction, that, on their decease, the interest of their shares should be applied in the maintenance, and be accumulated for the benefit, of the children of each of the sisters, *until they should attain the age of twenty-two years, and upon any of the said children attaining that age*, they to be entitled to their mother's share of the capital; with limitations-over, in case of any of the Case of *Vawdry*
v. Geddes.

(*p*) Mr. *Jarman* thus remarks upon this decision (1 Treatise on Wills, 772.):—"The propriety of this determination has been questioned; and, perhaps, looking at the gift-over, in connexion with the direction, to apply the interest of the children's shares, for their maintenance, until they became *absolutely* vested, there was ground to contend, that the children took, immediately, vested interests, subject to be divested, on their respectively dying under the prescribed age. It is to be observed,

however, that the question before the Court respected, merely, the bequest-over, to the testator's brothers and sisters, which was clearly invalid, on the ground of remoteness, whatever might be the fate of the prior bequest to the children of his daughter; so that the case seems to have been, in point of fact, no adjudication, as to the period of vesting under the prior bequest to such children."

(*q*) 4 Russ. 403.

(*r*) 1 Russ. & My. 203.

children dying under the age of twenty-two years. It was held, that the vesting of the shares of the children was postponed to their attainment of the age of twenty-two, and that, as all children, born before and after the death of the testatrix, were entitled under the bequest, it was too remote and void.

Case of *Judd v. Judd*.

In *Judd v. Judd*, (s) there was a devise and bequest, of residuary real and personal estate, to trustees, upon trust, to pay the income of one-third part, to the testator's daughter, S., for life, and after her death, to stand possessed of that one-third, in *trust for her child or children*, and to be transferred to them, on their attaining twenty-five; but, in case the testator's daughter should leave but one child her surviving, then, the whole of the one-third part to go to such only child, on his or her attaining twenty-five, and to be transmissible to his or her executors; and in case his daughter should leave no child her surviving, or in case she should leave a child, who should not attain twenty-five, then, over. It was held, by Sir *L. Shadwell*, V. C., that the children were not intended to take vested interests until they attained twenty-five, and that, therefore, the bequest to them was void for remoteness. The main ground of his honor's decision, in this case, was, that, by the terms of the gift, in case of there being one child only, it was plainly contingent upon the attainment, by that child, of the specified age, and, that the testator could not be supposed to have intended a difference in the time of vesting, when there was a plurality of objects, and when there was only an individual object. (t) An argument, against an immediate vesting, was, also, derived from subsequent dispositions, in the same will, of a similar character, which were admitted to be contingent. It was observed, however, by the learned judge, (u) that, standing alone, the bequest to the children clearly passed a vested interest, with a deferred enjoyment.

(s) 3 Sim. 525. See also *Hunter v. Judd*, 4 Sim. 455.

(t) 1 Jarm. Wills, 770.

(u) In *Hunter v. Judd*, *ubi supra*.

In *Porter v. Fox*, (*v*) a testator bequeathed the produce of his real and personal estate, in trust, to be accumulated, "for the benefit of his grandchildren, and his nephew, T. O., and to be distributed, in manner and form following, that is to say, *as they should become of the age of twenty-five years*, respectively;" with directions for the transfer of the share of each grandchild and nephew, on their respectively attaining twenty-five. Sir *L. Shadwell*, V. C., was of opinion, that the direction for distribution was part of the gift, and that, therefore, the vesting was postponed, till the legatees' attainment of the age of twenty-five.

Case of *Porter v. Fox*.

In *Dodd v. Wake*, (*w*) there was a bequest of a sum of money, unto and amongst the children of the testator's daughter, M. M., the wife of G., *who should be living at the time the eldest attained the age of twenty-four years*, and the issue of such of the children of his said daughter, as might then happen to be dead, leaving issue, *per stirpes*, and not *per capita*, and to be paid, when and as they should attain twenty-four. It was held, that, as the testator intended only those children of his daughter to take, who should be living when the eldest child, for the time being, attained the age of twenty-four, the bequest was not vested, till that period, and was, therefore, void for remoteness.

Case of *Dodd v. Wake*.

In *Newman v. Newman*, (*x*) a testator devised real estate, to A., for life, and after his decease, to trustees, in trust, to sell, and divide the proceeds of the sale, among all the testator's grandchildren, (the children of four children named in the will,) *who should attain the age of twenty-four years*, equally to be divided among his grandchildren attaining such age. It was adjudged, that the trust for the grandchildren was void, as too remote; the vesting being necessarily postponed, till their attainment of the age of twenty-four.

Case of *Newman v. Newman*.

In *Ring v. Hardwick*, (*y*) a testator bequeathed his

Case of *Ring v. Hardwick*.

(*v*) 6 Sim. 485.

(*x*) 10 Sim. 51.

(*w*) 8 Sim. 516.

(*y*) 2 Beav. 352.

residuary personal estate, to trustees, in trust for his wife, for life, and after her death, to make a division between the testator's four children, A., B., C., and D. ; his sons' shares to be paid immediately, and his daughters' shares to be invested for them, for life, with remainder, between all their children in equal shares, and to become vested in such children, respectively, at the age of twenty-five years; and, if any such children should die under that age, their shares should be divided amongst the survivors, who should live to attain that age, and if only one child should live to attain that age, then, to such only child, upon his or her attaining that age; and if either of the said daughters should die without leaving any such children, who should live to attain the said age of twenty-five years, then, in trust for and to be divided between all the children of his said other sons and other daughters, *who should live to attain the said age of twenty-five years*, in equal shares: the will contained powers of maintenance and advancement, out of the shares of any of the children, until their attainment of twenty-five. One of the testator's daughters having died without children, the share bequeathed to them was claimed by the children of another daughter, under the gift-over. Lord *Langdale*, M. R., observed:—"The children, on whose behalf this case has been argued, if they take anything, must take it, under that clause, directing a division between all the children who should live to attain the age of twenty-five years. It is admitted, that a gift, expressed by those words, is, by itself, too remote, and void; but then, it is said, there are other directions in the will, which ought to qualify that construction. The directions are, first of all, upon the death or second marriage of the wife, to invest, &c., the particular share previously given to a daughter, in the name of the trustees. Then, it is said, that, in the subsequent clause, which refers to a period when the children are under twenty-five, that which was intended for the children is termed, 'the share' of the children, and that,

therefore, the gift is vested, subject to be divested; but I consider this share means, such share as had been before given, that is, a share for such as should live to attain twenty-five years, and this subsequent clause cannot, therefore, alter the effect of the previous gift." "In respect to the clauses for maintenance, and for raising money for advancement, they are accessories to that which is void, and cannot, therefore, alter the construction." This case is brought forward, for the sake of the pertinent observations of the learned judge upon the ulterior gift. In truth, however, there does not seem to have been any necessity, to consider, whether that gift, in itself, was too remote, or not: for, as it was postponed to a bequest, which was, undoubtedly, in that predicament, (the vesting of the shares of the daughters' children being expressly postponed to their ages of twenty-five,) it was void, on that account. Nor was the case of the parties claiming under the gift-over, assisted by the argument, urged at the bar, that the prior bequest was a vested gift to the children, subject to be divested, on a child's not attaining twenty-five; for, even assuming such to be the proper construction of the first gift, the Executory limitation was, clearly, void, as depending on too remote an expectancy.

Lastly, in the very recent case of *Griffith v. Blunt*, (z) there was a bequest, in trust, to accumulate for all the children of A. and B., (who were living) equally, the shares of sons to be vested at twenty-five, and of daughters, at twenty-five, or marriage, and, if one child only, *to be paid* at twenty-five, or marriage; with cross-limitations, in case of the death of any son, under twenty-five, or of any daughter, under that age, unmarried: and it was held, that the bequest was too remote; the vesting, and not the time of payment and distribution only, being postponed.

Case of
Griffith v.
Blunt.

(z) 4 Beav. 248.

The authorities, applicable to cases of *immediate* or valid vesting and *postponed possession*, are now to be noticed.

Case of *Dodson*
v. *Hay*.

In *Dodson v. Hay*, (a) a testator gave unto the children of his sister, the whole of his real and personal estate, (subject to legacies,) and proceeded as follows:—"it is my particular will and desire, that the children, all of them, be educated with the yearly interest of whatever portion of my estate may fall to each respective child's lot or share, and *such portion not to be otherwise claimed or inherited*, directly or indirectly, until the said children arrive at the age of *twenty-two years*, whether married or single:" a daughter having died under twenty-two, her share was claimed by her representative. It was held, by Sir *R. P. Arden*, M. R., that the subsequent words were too vague, to control the previous clear bequest, from operating to give immediate vested interests to the children, and that, therefore, the representative of the deceased child was entitled to her share.

Case of
Montgomery v.
Woodley.

In the case of *Montgomery v. Woodley*, (b) there was a devise of real estate, with the residue of the personal estate, upon long limitations in strict settlement, including estates to *persons unborn*, and a subsequent direction, that none of the devisees should take, or come into possession, *before the age of twenty-five*. It was held, that this direction was confined to the actual possession, and did not operate, by way of *pro tanto* revocation of the prior gifts, which (as was observed by Lord *Alvanley*, C.,) would have had the effect of rendering all the limitations, to the unborn persons, void.

Case of
Bingley v.
Broadhead.

In *Bingley v. Broadhead*, (c) there was a devise to A., an infant, for life, and his first and other sons, in strict settlement, with remainders, for similar estates, and a direction, that, "during the minority of the heirs of the A. family," an accumulation of the rents should be made;

(a) 3 Bro. C. C. 404.

(c) 8 Ves. 415.

(b) 5 Ves. 522.

the accumulations to be laid out in a purchase, "until the minor arrives at the full age of twenty-five years, and, then, the heir to take full possession of this estate." A question arose, as to the disposition of the accumulated rents, between the tenant for life and the persons entitled in remainder; but the point, to be here noticed, is, that there was a *claim, by the heir-at-law of the devisor*, on account, (as must be supposed,) of the direction, as to the postponement of possession, having the effect of invalidating the remainders, subsequent to the first life-estate: which claim, however, *Sir W. Grant, M. R.*, deemed groundless.

In *Kevern v. Williams*, (d) there was a devise of residuary estate, to trustees, in trust for the testator's wife, for life, and after her decease, to preserve the then remaining part of the testator's estate, for the grandchildren of his brother, C., to be by them received, in equal proportions, *when they should severally attain the age of twenty-five years*, and when the youngest should have attained the age of twenty-five years, and he or she should have received their final dividend or share of the testator's estate, the trust should cease. It was held, that the bequest was not void for remoteness; a distinction being made, by the testator, between the time of vesting of the gift, and the time of enjoyment.

Case of
Kevern v.
Williams.

In *Bland v. Williams*, (e) there was a devise of residue, to trustees, upon trust, to receive the rents and profits, and apply them, or a sufficient part thereof, to the maintenance and education of the child or children of the testator's daughters, *until they should respectively attain the age of twenty-four*, and when and as they should respectively attain that age, then, to pay, assign, &c., all the residue, with such proceeds as should not have been applied for and towards their maintenance and education, equally, unto and amongst all the said children, *when and as they should severally and respectively attain the said age*; and in case any or either of the said children should die before they attained

Case of *Bland*
v. Williams.

(d) 5 Sim. 171.

(e) 3 Myl. & K. 411.

that age, and without lawful issue of his or her body, the trustees were to pay, assign, &c., all the residue, to *such of the same children as should attain twenty-four*, share and share alike, if more than one, and, if but one, then, the whole to that one; with a gift-over, if all the children should die under the age of twenty-four, and without leaving lawful issue. Sir *John Leach*, M. R., said, that the gift-over was, not simply upon the death under twenty-four, but, upon the death under twenty-four, without leaving issue; and, therefore, that the devise was, in effect, of a *vested* interest, with an Executory devise-over, in case of death under twenty-four without leaving issue. It may be observed, however, that the distinction, seemingly taken by the learned judge, between a gift-over, in case of the death of the devisee under a specified age, and a similar limitation, in the event of his death under that age, without leaving issue, appears to be ill-founded; and that the gift-over, in either case, is of equal force, in favor of the construction of an immediate vesting. (f)

Case of *Blease*
v. *Burgh*.

In *Blease v. Burgh*, (g) there was a gift of residuary estate, to trustees, in trust, to accumulate, and to stand possessed of the property, and its accumulations, in trust for all the children of J. B., other than A., and *to be paid on their attaining twenty-three*; with a gift-over, in the event of the death of all the said children under twenty-three. It was held, by Lord *Langdale*, M. R., that the legacy passed immediate vested interests to the children of J. B., with a postponed time of payment.

Case of *Doe d.*
Dolley v. Ward.

In *Doe dem. Dolley v. Ward*, (h) a testator devised freehold and other property, to trustees, in trust for his daughter, S., for life, and from and after her decease, to such of her children as she then had, or might have, if a son or sons, at his or their *age or ages of twenty-three years*, and, if a daughter or daughters, at her or their age or ages of twenty-

(f) See 1 Jarm. Wills, 774, 775,
776.

(g) 2 Beav. 221.

(h) 9 Ad. & Ell. 582.

one years, their respective heirs, executors, administrators, and assigns, according to the nature thereof, as tenants in common; and in case of the death of any child of S., if a son, under twenty-three, and, if a daughter, under twenty-one, his or her share to go to the survivors and survivor of the said children, being a son or sons, at his or their *age or ages of twenty-three years*, and, being a daughter or daughters, at her or their age or ages of twenty-one years; and in case S. should have only one child, if a son, that should attain twenty-three, and, if a daughter, that should attain twenty-one, the testator gave the aforesaid property, unto such only child, so attaining such age, his or her heirs, executors, and administrators; and the testator directed, that the rents issues interest and annual produce should, until his said grandchildren attained such ages as aforesaid, be applied for their maintenance and education. The will contained a devise-over, to a son and other daughters of the testator, and their children, if all the children of S. died under the prescribed ages. There was, also, an ultimate devise-over, in case of the death of all the testator's grandchildren, then born or thereafter to be born, if a son or sons, under the age of twenty-three, or, if a daughter or daughters, under the age of twenty-one, without leaving any child or children, them or any of them surviving, in favor of the testator's nephews and nieces. The testator's daughter, S., having died, the freehold property was claimed by the heir-at-law, on the ground, that the devise to the children of S., and all the subsequent limitations, were too remote, and void. After an elaborate argument, and a thorough investigation of the authorities, the Court of B. R. decided, that the children took a vested interest, on the death of S., and, consequently, that the devise to them was not void for remoteness.

Besides these authorities, there are the cases of *Ross v. Ross*, (i) *Bresdon v. Tugman*, (k) *Phipps v. Williams*, (l)

(i) 1 Jac. & W. 154.

(l) 5 Sim. 44.

(k) 3 My. & K. 289.

Snow v. Poulden, (m) *Joselyn v. Joselyn*, (n) *Doe dem. Cadogan v. Ewart*, (o) and *Saunders v. Vautier*, (p) in which the question of the remoteness of the limitation did not

(m) 1 Keen, 186.

(n) 9 Sim. 63.

(o) 7 Ad. & Ell. 636.

(p) 1 Cr. & Ph. 240; 4 Beav.

115. In reference to this case, and that of *Joselyn v. Joselyn*, *ubi supra*, a recent writer on the Thellusson Act, (39 & 40 Geo. 3, c. 98,) after noticing those cases, in which directions for accumulation have been held *wholly void*, as exceeding the allowed limits of *perpetuity*, and not void for the excess only, as would have been the construction, had they only transgressed the boundaries of accumulation, has observed, as follows :—" There is another class of accumulations, which, at first sight, appear to be within, but, upon consideration, will be found to be beyond, the operation of the Act; and, upon the same principle, as was involved in the preceding cases. The cases alluded to are, where gifts or legacies are directed not to be fully enjoyed, until some years after the donee or legatee shall have attained majority; and accumulation expressly or impliedly is directed, until the gift or legacy becomes enjoyable. In these cases, if the gift or legacy can, on a fair construction, be held to vest, and be payable, when the donee or legatee attains majority, according to the rules of laws affecting the case, *dehors* the act, the fund, with its accumulations, will be ordered to be transferred at that age; the subsequent accumulations failing, not by force of the Thellusson Act, but, because they were void, *dehors* that Act. Thus, in the cases of *Joselyn v. Joselyn*, and *Saunders v. Vautier*, all consideration of the Thellusson Act was excluded; the Court proceeding to the construction of the

testator's will, precisely as if that Act had not passed; and, having, in each case, held, that the infant took an immediate vested interest in the legacy, ordered the fund, with its accumulations, to be transferred to the infant, on his attainment of twenty-one years of age; although the testator had directed the accumulation to continue, in the former case, until the donee had attained twenty-four, and, in the latter, until he had attained twenty-five years of age; and although, in both cases, the accumulation, as directed by the testator, would not have exceeded the statutory limits " Hargr. Accum. 109, 110. Now, if, by the accumulations failing, " because they were void, *dehors* the Thellusson Act," be meant, their remoteness under the law of Perpetuity, the whole of this proposition must be excepted to. For, in *Joselyn v. Joselyn*, and *Saunders v. Vautier*, the legatee was a person *in case*, and the postponement of the vesting beyond majority would not, therefore, have rendered the gift, void for remoteness (*vide supra*, p. 458). Nor was the legacy, in either of the cases in question, " held to vest and be payable, when the donee or legatee attained majority;" and, on that ground, transferred, with its accumulations, to the legatee, at that age; for, it was expressly decided, that the legatees took immediate vested interests, without reference to majority, or any other age. As far as the doctrine of Perpetuity was concerned, the legacies might have been held to vest at the ages specified in the bequests, or at any other ages, had the rules of law required such a construction; and it is quite clear, that, in such a case,

arise, as the devisee or legatee, in each case, was a person *in esse*, and named; and the postponement of beneficial enjoyment by him, therefore, to some age greater than majority, (which was the fact, in each of the cases mentioned,) could not affect the validity of the limitations; but those cases are, nevertheless, valuable, as proving the disposition of the Courts, both of law and equity, towards the vesting of estates, where a contrary construction is not forced upon them, by the unambiguously expressed intent of the author of the gifts.

It has been above remarked, (*q*) that, in cases where the possessory enjoyment of limitations is deferred to too remote a period, the possession will be accelerated, *to the extent of the excess of postponement*. But, this must be understood, with the qualification, that there is some *valid divesting gift*, to take effect before the expiration of the period, to which the suspension of actual enjoyment is so cut down; for, if there be no such divesting limitation, the donee will, in all cases, be entitled to the possession of the property, or to the receipt of the fund, on his attainment of

The extent, to which the possession is accelerated, in the cases under consideration.

the accumulations might have gone on, for twenty-one years from the testator's death, as not being "void *dehors* the Thellusson Act." The true ground of the decisions, in the two cases alluded to, seems to be, that, the legacies being vested at once, and there being merely a postponed enjoyment, without any gift-over, in the event of the legatees not attaining such full enjoyment, the consequences of the right of property inevitably attached; one of which was, the power to assume an absolute control over, and, therefore, to demand a transfer of, the fund, immediately on attaining majority; it being open to the legatee, either, to allow the accumulations to proceed, until his attainment of the age specified in the will, or, (as the attainment of a particular

age was not of the essence of the gift,) to anticipate the accumulations, by taking the fund into his own hands, immediately the law gave him the power of affecting or disposing of his property. That this is the proper interpretation of the decisions in question, is conclusively established, by the observation of Lord *Langdale*, (4 Beav. 116,) on one of the cases again coming before the Court, to the effect, that, "where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment, the moment he is competent to give a valid discharge."

(*q*) *Vide supra*, p. 512.

majority; because, as, *ex hypothesi*, he is the only person interested under the limitations, and entitled to the income, and, as he is competent to claim possession, and give all necessary discharges, no object is to be served, by delaying his personal enjoyment, and by accumulating income, which the donee must, in any case, enjoy, either personally, or, by his representatives, whether in the character of an aggregate, or of a yearly-accruing, fund. (r)

(r) *Vide supra*, p. 529, n.

CHAPTER XXIII.

OF THE RULE AGAINST PERPETUITIES, AS IT AFFECTS
VESTED LIMITATIONS, MADE SUBJECT TO SUBSEQUENT
DIVESTING GIFTS.

WHENEVER a gift is creative of a present vested interest, with a deferred period of enjoyment, it is usually followed by an Executory limitation, to take effect in case of the death of the donee under the age, or prior to the happening of the contingency, at or on which his interest is to be completed in possession. Indeed, as we have seen, the circumstance of there being such a gift-over, is one of the most forcible arguments, in favor of the immediate vesting of the limitation, in cases of doubtful construction. Having ascertained, in any given case, that there is a futurity of possession only, as distinct from a postponed vesting, the question arises, whether, where the original gift is subject to a divesting clause, to take effect upon the death of the donee before the arrival of the period of possessory enjoyment, that period is within the prescribed boundaries of remoteness. And so, also, if the first limitation be, to a class of persons, who are not to become entitled in actual possession, until a period, posterior to the time of vesting, and the gift is followed by a clause of accruer or survivorship, between and among the members of the class, in case of the death of any of them, prior to the time of possessory enjoyment, the question of the remoteness of the event, contemplated by the divesting gift, inevitably arises. Upon the assumption of the vesting and possession

Remarks as
to limitations,
divesting prior
valid gifts,
and their con-
nexion with the
perpetuity-
rule.

of the original gift being coincident, this question can never directly arise : because, if that gift be valid, the Executory limitation, which is to take effect in the alternative of the same contingency, must be good, also ; and it is equally certain, that, if the first limitation be void, as too remote, the ulterior gift must, likewise, necessarily, fail.

Rule is, that prior limitation becomes absolute, and remote divesting gift is void.

The general rule is, that, if the clause of accruer, or other the gift, engrafted on, or limited in derogation of, the original limitation, is to take effect on too remote a contingency, such limitation is not invalidated, but is rendered absolute, by relieving it from the clauses, qualifying or divesting the interests of its objects. (s) The interest, first given, being (upon the hypothesis assumed,) vested, it can only be made liable to be defeated, by a gift of perfect validity, and unambiguous import. And if such qualities cannot be predicated of any particular Executory limitation, it is manifest, that, so far as concerns its effect upon the original gift, the latter must be construed, as though it had been limited absolute and entirely unrestricted : for, to hold, that a limitation, though void in itself, should yet have the force of qualifying or divesting a previous perfectly valid gift, no otherwise connected with it, would be, to retain the practical influence of a disposition, while its scope and object are condemned and frustrated.

And same, although party taking under first gift, die before period or event contemplated by divesting clause.

It is a consequence of this rule, that, where the donee, entitled under the original gift, dies after acquiring a vested interest, although before the age or other the contingency contemplated by the remote divesting clause, as the event on which that interest was to become absolute and indefeasible, his representative will be entitled, in the same manner, as if the enjoyment had been in no wise postponed, and no divesting gift had been superadded. And, accordingly, in several of the authorities before cited, in which the construction of an immediate vesting obtained, it will be found, that the dispute, as to the character of the limi-

(s) 1 Jarm. Wills, 253.

tations, was carried on between the representative of the person entitled under the original gift, and the object of the Executory limitation. (t).

On the other hand, it scarcely needs observation, that, if the divesting clause be not too remote, the happening of the specified contingency will terminate the interest originally given, whether in the hands of the donee, or his representative, (supposing it to have no reference to his death under a particular age, in which case, there can, of course, be no representation,) and will give effect to the Executory limitation.

If divesting gift not too remote, it will take effect.

The foregoing observations will demonstrate the fallacy of the argument, not uncommonly urged, (u) that, the construction, necessarily alternative to that of a *postponed* vesting and enjoyment, being, that the interest is *immediately* vested, subject to be divested, the divesting clause, in such latter case, is, consequently, not void for remoteness; in other words, that the construction which validates the original gift, is equally preservative of the Executory limitation.

Remark as to a common fallacy upon this subject.

It remains, to be observed, that, though the period of deferred enjoyment, and the contingency, provided for by the divesting clause, ordinarily, correspond; the gift falling into possession, and becoming absolute and indefeasible, simultaneously; the effect of the event contemplated being too remote, materially differs, in respect to each. We have seen, that, as regards the postponed possession, the excess of remoteness is vacated, and the enjoyment, accelerated. But, with reference to the divesting clause, the contingency contemplated, must be, either, wholly good, as within the limits, or, it must be entirely void, as too remote: it cannot be left to eventual determination, whether the Executory limitation shall be capable of taking effect, or not, within the Rule against Perpetuities.

Remote divesting limitation wholly fails; not void, merely as to excess.

(t) And see *Lane v. Goudge*, 9 Ves. 225; *Jones v. Machilwain*, 1 Russ. 220.

(u) See the argument, for the legatees-over, in *Ring v. Hardwick*, 2 Beav. 367.

CHAPTER XXIV.

OF THE RULE AGAINST PERPETUITIES, AS IT AFFECTS LIMITATIONS, ABSOLUTE IN THE FIRST INSTANCE, WITH SUBSEQUENT QUALIFYING AND RESTRICTING GIFTS ENGRAFTED UPON THEM.

It has been already hinted, that, in deciding on the character of a limitation, in reference to the period of its vesting, the Courts do not pay any regard to the consequences which may attach on any particular construction, by the application of the Rule against Perpetuities, if, upon principle and authority, such construction would hold, in a similar case, where the remoteness of the limitation did not come in question. But this disregard of consequences will not be allowed to extend to cases of gifts, the remote portion of which is superinduced upon, or has no necessary connexion with, a prior complete and valid disposition.

Illustration of
class of gifts
here noticed.

As, if property be limited, by will, to an unborn person, absolutely, and, in a subsequent part of the same will, or, in a codicil, there be a clause, curtailing the previous absolute gift, to a life-interest, by a provision, that the property shall be settled upon the devisee or legatee, for his life, only, and after his decease, upon his children. Here, it will be perceived, the restrictive gift is engrafted upon a limitation, perfectly complete in itself, and does not, therefore, so necessarily form part of it, as to involve it in any invalidity, which may affect the former. And, accordingly, in such cases, it has been held, that the first absolute gift

In these cases,
remote modi-

takes effect, and that the modifying clauses must be rejected. This rule, as it has been said, (v) proceeds from an anxiety, to prevent a testator's dispositive scheme from proving abortive, on account of the remoteness of a specific portion of such scheme. And the particular ground, on which the construction in question is rested, is, that the author of the limitations intends the prior absolute gift to prevail, *except so far only as it is effectually superseded* by the subsequent qualifying one. (w)

fyng gifts
rejected.

Thus, in *Carver v. Bowles*, (x) a testatrix, under a *power of appointment*, in favor of her children, contained in her marriage-settlement, appointed the property, to her five children, two sons and three daughters, in equal shares, *absolutely*; and the testatrix then declared, and appointed, "so far as she lawfully or equitably could or might," that the one-fifth so appointed to each of her daughters should be held upon trust for the daughter, for her separate use, *for life*, and after her decease, for the *children of such daughter*, and in default of children, in trust for such persons as the daughter should appoint, and in default of appointment, for her next of kin. It was held, by Sir J. Leach, M. R., that the words of the appointment were sufficient, to vest the shares absolutely in the daughters, in the first instance, and that the attempted restriction of their interests, by means of limitations to their issue, being inoperative, as too remote, did not abridge the absolute appointment: his honor was of opinion, however, that the restrictions, as to the enjoyment by the daughters, were good, and took effect. This latter circumstance proves, how strongly the Court will endeavour to support the testator's main disposition; as the trust for separate use and proviso against anticipation, which the Court held valid, were part of the very restrictive gift, the main object

Case of *Carver*
v. Bowles.

Observations
upon *Carver v.*
Bowles.

(v) 1 Jarm. Wills, 257.

Arnold v. Congreve, 1 Russ. & My.
209.

(w) Ibid.

(x) 2 Russ. & My. 306. And see

of which was condemned and frustrated, as inoperative to control the previous absolute appointment.

*Case of Kampf
v. Jones.*

Again, in the case of *Kampf v. Jones*, (y) a testatrix, having powers of appointment, under two settlements, in favor of her children, appointed part of the trust funds, to her five children, four sons and one daughter; and the testatrix directed, that the share of the daughter should be a vested interest in her, on attaining twenty-one, or marriage with consent; but she, also, directed, that such daughter's share should, on her attaining a vested interest, be invested in the joint names of the trustees and the daughter, and that the same should be held, in trust for the daughter, for her separate use, for her life, and after her decease, in trust for her children, equally, and in default of children, in trust for her next of kin. A question arose, whether the interests, appointed to the unborn children of the daughter, which were too remote, belonged to her, or were divisible between all the children of the testatrix, in consequence of the default of appointment; it being contended, on behalf of the daughter, on the authority of *Carver v. Bowles*, that, the fund being appointed to her, in the first instance, the absolute gift to her, of one-fifth, had not been cut down by the subsequent ineffectual gift-over to her children; and that, consequently, she was absolutely entitled to that portion of the fund. Lord Langdale, M. R., said:—"I think, that, upon the authority of the case of *Carver v. Bowles*, this is an absolute appointment, for the benefit of this lady, subject only to such restrictions, within the limits of the power, as are afterwards properly imposed on her. The difference, between this case, and the case of *Carver v. Bowles*, which strikes one at first, is, that, in the case of *Carver v. Bowles*, the gift-over was contingent, on whether the testator could do what he was about to do: he says, 'so far as I lawfully or equitably can or may.' Now, I think, although those words

(y) 2 Keen, 756. And see *Church v. Kemble*, 5 Sim. 525.

are not contained in the clause in this will, yet, the effect must, necessarily, be the same. She has used very nearly the same words, which were considered to give an absolute vested interest to the daughter. She has made limitations, which, to a certain extent, were quite within her power ; but she has attempted to make others, which were beyond the limits of her power ; and I think, that the absolute gift ought to have effect, subject to the limitations which were within the power, and free from the others."

And so, also, in the case of *Ring v. Hardwick*, (z) there was a bequest of residuary personal estate, in trust for the testator's wife, for life, or until widowhood, and after her death or second marriage, to make a division between his four children ; the shares of his two sons to be paid and transferred to them, immediately upon the decease or second marriage of his wife ; but, as to the shares of the testator's personal estate, which would become the property of his daughters, his will was, that the whole of such shares should be invested, and the dividends of the respective investments paid to each of his daughters, for her separate use, for her life, and after her decease, then, that the capital should be divided amongst and between the children of such daughter, in equal shares, at the age of twenty-five ; with substitutionary gifts, in case of the death of any of the children of the daughters under the required age ; and of an entire failure of children of the daughters attaining such age. A daughter having died without children, her share was claimed by her administrator ; and it was contended, in support of that claim, that the direction to distribute among the testator's children was an absolute gift, and that, the attempt to restrict that interest, by limitations to the children of the daughters, failing for remoteness, the absolute gift remained unaffected. Lord *Langdale*, M. R., said, that he thought, there was sufficient to be collected, from the prior words in

*Case of Ring
v. Hardwick.*

(z) 2 Beav. 352.

the will, to give an absolute interest to the daughters ; and that those prior words were so connected with what followed, as to show, that the testator intended a restriction of that absolute interest : and that, the restriction not having become effectual, the whole interest remained according to the original gift.

Case of *Wells*
v. *Maling*.

And, upon the same principle, appears to have been the decision in the case of *Wells v. Maling*, (a) where there was a bequest of a residue, to be equally divided between A., B., C., and D., with benefit of survivorship between them, in case of the death of any or either of them without issue ; and it was held, that the gift was absolute, and the clause of survivorship, void.

Case of
Saumarez v.
Saumarez.

Again, an exemplification of this doctrine is to be found in the recent case of *Saumarez v. Saumarez*, (b) where a testator, having devised freehold property, to his son, R., (without words of limitation,) directed, that his residuary estate should be divided between his son and two daughters, subject to the following restrictions ; and the testator then proceeded thus :—" It is my express direction, that whatever portion may devolve to my said son shall be placed in the names of three trustees, the interest of which shall be paid to him, during his life. And I direct, that, after his death, the share belonging to him may be *divided between his children*, and placed in the names of trustees, with a power, to employ the interest for their maintenance and education ; and I give the said trustees, a discretionary power, to employ a portion of the capital, if it be found necessary, for their advancement and settlement in life ; and *after each of them has attained the age of twenty-five years*, the whole of their share to be transferred to them." " Should my son, R., die without issue, the whole of the portion which may have been placed in trust for him is to devolve to his two sisters, during their life, in equal pro-

(a) Reported in 3 Jur. 36.

(b) 4 My. & Cr. 331.

portions, and after their death, to their children. And, in like manner, if any of his children should die after him, and *before they have attained the age of twenty-five years*, such portion as they possess is to be divided between the surviving brothers and sisters, and in default of them, the whole is to go to the children of my daughters, M., and C., in equal proportions." Upon a bill filed for execution of the trusts of the will, and declaration of the rights of the parties, one of the questions was, as to the quantity of interest taken by R., in the devised real estate; and, if only a life-estate passed under the devise to him, whether the reversion in fee was included in the residuary disposition. The Master of the Rolls decreed, that the son took only a life-estate in the freehold property, and that the reversion in fee passed to him and his two sisters, in equal undivided third parts, under the residuary clause. Upon appeal, this decision was affirmed by Lord Chancellor *Cottenham*; his lordship concluding his judgment, with the opinion, that the reversion of the real estate, which passed to the residuary devisees, "*must be subject to the same trusts and limitations, as the rest of the property comprised in that clause.*" This expression, obviously, assumed, that the qualifications, superadded to the residuary devise, were valid; and that, again, depended upon the question, whether the *vesting* of the interests of the son's children, was suspended, until their age of twenty-five. If the latter inquiry be determined in the affirmative, it is clear, that the limitations to the children were void, as too remote; and, it seems equally certain, that, in that case, as, under the first part of the residuary clause, there was an absolute gift to the testator's son and daughters, the son's share would remain vested in him, unaffected by the ulterior restrictive or qualifying limitations. Whether this point was present to the mind of the M. R., when he pronounced his decree, that the son and daughter were entitled to the reversion, in *fee-simple*, under the residuary gift, does not appear; but it may, perhaps, be considered, as more than probable, that such was the case.

Doctrine obtains, notwithstanding ordinary rule, in favor of latter of two inconsistent gifts.

The rule of construction, we have been considering, it will be observed, affords the greater evidence of the inclination of the Courts, to uphold testamentary dispositions, when the remote portion can be separated from the valid gift, (c) as it, in some measure, contravenes the general rule of law, which prefers the posterior of two inconsistent limitations, in a will.

Similarity of this class of limitations to that considered in last Chapter.

It will, also, be perceived, that this doctrine bears a strong resemblance to the rule, discussed in the preceding Chapter, in reference to remote divesting gifts, engrafted on prior limitations, presently vested: the difference consisting, chiefly, in this; that, in regard to the former, the intention of the testator may generally be presumed to have been, to confine the absolute devisee or legatee, to a life-interest; whereas, in the case of the latter, there is (upon the terms of the hypothesis,) a clear intention, to give the whole property, subject only to a disposition of it, to another person, on a specified event.

Whether doctrine applicable to limitations in deeds.

It may be doubtful, how far this rule would be applicable to limitations in *Deeds*; that is, whether it is grounded, so exclusively, on the general favor shown to testamentary dispositions, as to leave no sufficient reason, on which to rest, an extension of it to gifts in instruments *inter vivos*. The argument, founded on the ineffectual character of the restrictive or qualifying clause, is, certainly, of equal force, whether applied to limitations in wills, or, in deeds; but it may be questioned, whether that argument enters so far into the essence of the rule, as to necessitate, or, even, admit of its application to limitations, of the character contemplated by it, when other than testamentary.

(c) It is not to be supposed, however, that this rule proceeds solely from a desire to support a valid limitation, against the operation of a remote restrictive clause; for, in the case of *Whittell v. Duden*, 2 Jac. & W. 279, (which preceded all the cases

cited in the text,) Sir T. Plumer, M. R., acted upon the principle of holding a prior absolute gift unaffected by a subsequent qualifying limitation, in events *not provided for* by the latter.

CHAPTER XXV.

OF THE RULE AGAINST PERPETUITIES, AS IT AFFECTS THE
LIMITATION AND EXERCISE OF POWERS OF SALE, EXCHANGE,
PARTITION, LEASING, AND THE LIKE.

As the Rule against Perpetuities requires every limitation of a future interest to be such, as, in its own form and nature, will necessarily take effect, if at all, within the prescribed limits, it may, at first sight, seem, that Powers of sale, exchange, partition, and leasing, which are but modifications of future Uses, should, in their original limitation, comply with this requisite. Regarding them, abstractedly, it cannot be said, that there is any reason for the confinement of direct Executory limitations, which does not equally oblige to the restriction of the exercise of these special Powers, within the allowed limits of remoteness.

Powers of sale, &c., in their own nature, within the operation of laws against remoteness.

Any exemption, therefore, which may be claimed for these limitations, from the perpetuity-rule, must be grounded on considerations, *extrinsic to their own nature*.

Any exemption, therefore, grounded on extrinsic considerations.

Whether any necessity do really exist, for restricting Powers, of the kind under consideration, to the perpetuity-boundary, has long been a question with writers on real property-law; while, on the other hand, the admitted practice of the profession was, for a long series of years, conducted, upon the notion, that such Powers were valid, although unrestricted; so as, on the first mooted of the question, to excite the remark, by a great law luminary, that a contrary rule would shake half of the titles in the kingdom.

Practice long conducted on assumption of their exemption.

Doubt of
legality of
unrestricted
Powers
originated in
decision in
Ware v.
Polhill.

The doubt arose in consequence of a decision, by Lord *Eldon*, in *Ware v. Polhill*. (*d*) In that case, freeholds and copyholds were devised to the testator's son, for life, remainder, to trustees, to preserve contingent remainders, remainder, to his first and other sons, in tail, with remainders-over; and leaseholds were bequeathed to trustees, in trust, to renew, and to pay the rents, to the persons, who, under the preceding limitations, should be, for the time being, entitled to the rents of the freeholds and copyholds; and the testator empowered the trustees, at any time thereafter, with the consent and approbation of the person, who should, for the time being, be entitled to the rents and profits of the freehold and copyhold estates, or, in case such person should be a minor, then, at the discretion of the trustees, to sell and dispose of his leasehold estates, and to invest the money, arising from such sale, in the purchase of freehold or copyhold hereditaments, to be conveyed and surrendered to the uses declared of the freeholds and copyholds devised; and until such purchase, the sale-monies to be invested, and the interest paid to the person for the time being entitled to the rents of the devised estates. The power of sale not having been exercised, and a grandson having died under twenty-one, without issue, it was asserted, on behalf of persons, entitled, in remainder, to the real estates devised, that it was the intention of the testator, that all his property, not real estate, should be converted into realty, and limited in strict settlement; and that the trustees ought to have sold all the leasehold estate, accordingly: that the intention was, to provide for the issue male; and that the leasehold estate, while unsold, should go with the freehold, as far as the rules of law and equity would permit; and not vest in a tenant in tail so as to be transmissible. Lord *Eldon* was of opinion, that the leasehold estates vested absolutely in the deceased grandson, as

quasi-tenant in tail, upon his birth; and, with reference to the power of sale, (which is the point material in this place) his lordship subsequently delivered himself thus:—"Upon further consideration, as to the leasehold estate, I think, that power of sale is void; for it may travel through minorities, for two centuries, and if it is bad, to the extent to which it is given, you cannot model it, to make it good. I think, the soundest ground is, that the power is bad." The exact meaning and extent of this decision, it is not easy to arrive at; although the expressions of the learned judge certainly lead to the supposition, that he was influenced by some idea of the possible remoteness of the power. Sir *Edward Sugden* (e) explains it merely to mean, that, where a leasehold estate is settled as realty, but so as to vest absolutely in a *quasi*-tenant in tail, a power to defeat his estate, by selling the property, and buying real estate, to be re-settled, is void; and says, that the Lord Chancellor did not intend to impeach the validity of the powers before alluded to; the particular feature of the case being, that the effect of a sale might have been, to defeat altogether the estate of the representative of a person, who died entitled to a vested interest in the absolute property. (f) But, ad-

Nature of the
decision in
Ware v.
Polhill.

(e) Sug. Pow. (3rd ed.) 144; ib. (6th ed.) vol. 2, p. 493.

(f) Mr. *Jarman* has thus alluded to the character of the decision in *Ware v. Polhill*, in reference to the distinction, he conceives to exist, between the Power, in that case, and the ordinary Powers of sale, &c. "The case is different," says that learned writer, (1 Jarm. Pow. Dev. 251,) "where, as in *Ware v. Polhill*, an absolute ownership is given, though to infants, or persons unborn, with a power of sale, to third persons, not expressly restrained, in its exercise, to the minorities of those persons, nor limited, by its purpose and object, within the prescribed boundary, but

authorising an indefinite conversion of the property, and tending, therefore, to keep it in a state of perpetual uncertainty or fluctuation; and it seems to be a material ingredient in that case, that the execution of the power involved a change, not merely in the nature of the property, but in its destination; so that, in effect, if not, in terms, it did tend to a perpetuity, in the truest sense of the word. There is ground to contend, that the power would not have been open to the same objection, if it had extended only to the conversion of the leaseholds into freeholds or copyholds, to be settled upon the trusts declared of the *leaseholds*, for, then,

mitting this view of the decision, the reason assigned seems insufficient, for denying validity to the power; as there appears to be no greater argument, against allowing the exercise of a Power, to divest the estate of a representative of the person entitled to the absolute interest in leaseholds, than, against the operation of any other Power, which may, probably, or, possibly, defeat a vested fee-simple, (whether residing in the original donee, or his representative,) but which is, clearly, not, on that account, exposed to any objection.

But, whatever may have been the real ground of Lord Eldon's rejection of the Power, in *Ware v. Polhill*, it may suffice, to observe, that the decision created great alarm among practitioners, as, apparently, affecting the common Powers of sale, exchange, &c., ordinarily inserted in marriage and other settlements, and which, as before remarked, it had not been customary, expressly to confine, within the limits of perpetuity. And, notwithstanding the general impression, that the validity of such Powers was not impeached by the case of *Ware v. Polhill*, and that it was not necessary, to limit their exercise to the boundaries of remoteness, much doubt and uncertainty continued to exist; as it was natural to suppose, that the opinions expressed upon the subject, conformed to that view, rather, out of regard to what had been the constant view and practice of Conveyancers, than, from a consideration of the abstract merits of the question, as founded on principle, apart from convenience.

Opinions of
text-writers
favorable to
unrestricted
Powers.

For some time, each successive text-writer gave in his adherence to the practice of *non-restriction*; and, thus, a law was being gradually made, to that effect, even upon the supposition, that the principle of it was insupportable.

the duration of the power would have been circumscribed by the ownership under the limitations, and, in the meantime, would have subsisted, only as a power of varying the investment. In this point of view, it would seem

to be analogous to a power of sale, in a strict settlement, where the first tenant in tail attaining twenty-one may, by a recovery, acquire the absolute ownership, discharged of the power."

Thus, Sir *Edward Sugden*, (*g*) declared, that the validity of the common Powers of sale and exchange was not impeached by *Ware v. Polhill*: that the general practice had been, not to confine them to lives in being and twenty-one years; and that half the titles in the kingdom depended on the validity of such Powers: that, if the Power was within the law of perpetuities, the line could always be drawn, and that there appeared to be no reason, why it should be deemed void, in its creation: that such Powers did not operate to defeat estates, or destroy interests, but, merely, to transfer them, from one property to another: and that Powers of sale and exchange, in strict settlements, were valid, like other Shifting Uses, as they might be destroyed by the recovery of tenant in tail. So, Mr. *Preston* (*h*) maintained, that the common Powers of sale and exchange, in marriage settlements and wills, though not prescribed to be exercised within a given period, were good, as to the estates for life, because, as to them, the power fell within the limited period; and, also, as to estates-tail, because the power might be barred by any tenant in tail; but was void, as to the remainder or reversion in fee, when it fell into possession, or was discharged from the estates-tail. So, also, the *Real Property Commissioners* (*i*) considered, that, wherever the consent of the parties beneficially entitled was required to an exercise of the power, or an estate-tail was created, the power was valid, as a conveyance by the former, and recovery by the latter, would, at any time, destroy it. And Mr. *Coventry*, (*k*) also, contended, that, if the consent of the tenant for life was made an essential preliminary to the sale or exchange, it was difficult, to see, how the rules of perpetuity could be transgressed: that estates for life could not be given to the issue of children unborn, and if the consent of a tenant in tail was essential,

(*g*) Pow. (3rd ed.) 146; ib. (6th ed.) vol. 1, p. 181, vol. 2, p. 494.

(*h*) Essay on Abst. vol. 2, p. 158.

(*i*) 3 Rep. 34.

(*k*) Conv. Ev. 87, 88.

then, the power must be subservient to the estate-tail, and might be barred, with it, by a common recovery: that a power of this description, to be exercised indefinitely, during the minorities of each succeeding tenant in tail, was, also, so far amenable to the preceding estate-tail, that it could scarcely be said to create a perpetual and indestructible power: and that Powers of leasing and partition were, also, exposed to remarks of the same kind. Mr. *Jarman*, (1) likewise, thought it probable, that the prevalent opinion and practice of Conveyancers would be allowed to exert considerable influence in the decision of the question; and that an opinion, in favor of their validity, had prevailed to such an extent, that a contrary determination would be fatal to numerous titles. Mr. *Sanders*, (m) again, considered, that Powers of selling and exchanging, reserved to trustees, to be exercised with the consent of the tenant for life or tenant in tail, for the time being, in possession, was not within the reason of a perpetuity. And, again, the author of the *Compendium of the Law of Real Property* (n) observed, that, if the Powers were made exerciseable only with the consent of persons living, or of the guardians of infants, who should immediately succeed them in estate, no further restriction could be required: and, even, in reference to a conveyance, for life, with remainder, in fee, with a power, to a person and his heirs, to revoke the uses; which, he thought, could, hardly, be contended to be valid; he remarked, that it was difficult to determine, how far the frequent neglect of this rule, in practice, might impose a duty on Courts of justice, of endeavouring, if possible, to evade it.

These sentiments, it will be observed, in various degrees, confirm the view of the validity of the special Powers in question, unconfined in point of remoteness, *when the consent of the parties beneficially entitled is required to an exercise of the power, or, when estates-tail are created.*

(1) 1 Jarm. Pow. Dev. 248, 388;
7 Jarm. Conv. 538.

(m) Uses and Trusts, 194, 195.
(n) Pp. 271, 272.

But, it may be well, to disencumber the question of two or three considerations, which have been, (as it would seem) improperly, introduced into it, as not having any real connexion with its merits.

The argument, for instance, that the power does not operate to defeat or destroy estates, but, only, to effect a change of title, (*o*) does not apply to Powers of leasing, and Powers of revocation of Uses, and other Powers, not transferring the interest of the party beneficially entitled, to some other subject-matter; and, were it otherwise, this reasoning, as has been well observed, (*p*) is, at best, only an *equitable* answer to a legal objection. In addition to which, the property substituted under the power (supposing the validity of a Power of sale in question) may be, in its nature, totally different from that sold, and be transmissible in a very different manner, under similar limitations; which circumstance seems to deprive the argument, as to the sale merely effecting a change of title, of much of its force. (*q*)

Questionable arguments sometimes urged for validity of unrestricted Powers.

Again, it has been said, (*r*) that a Power of sale is favorable to alienation, and is not, therefore, exposed to the laws against Perpetuities. But, the answer to this is, that a Power of sale, suspended indefinitely over the fee, is open to the same objection, as an Executory devise or Springing Use, to take effect whenever A., or his heirs, shall do a given act. (*s*) And it seems but an astute evasion, to say, that the power of alienation of the reversioner or remainder-man is not fettered, and that the *subject of his transfer* is, merely, *liable to the conditions in the settlement.* (*t*)

And, as to the argument, that the power is liable to destruction by tenant in tail, it manifestly fails to meet the case

(*o*) See 2 Sug. Pow. 494.

(*p*) Hayes Conv. 388.

(*q*) The reasons, on which the decision in *Ware v. Polhill* is accounted for, apply to such a case. *Vide supra*, pp. 543, 544, and note.

(*r*) 2 Sug. Pow. 494.

(*s*) Hayes Conv. 388. And see observations of *Bayley, B.*, 2 Cr. & Jerv. 339.

(*t*) 2 Sug. Pow. 495.

of the power being declared upon a conveyance *in fee*, or in a settlement, whereby *no estate-tail is created*.

These observations premised, it will be proper to introduce a brief notice of the decisions, which have been pronounced, of late years, (u) upon cases of unrestricted Powers of sale, &c., prior to a detailed enunciation of what, it is conceived, are the doctrines upon this subject, most accordant with principle, and best supported by authority.

Authorities
upon the
subject of
unlimited
Powers.

These adjudications are few in number, and, by no means, answer the full necessities of the case. In the case of *Biddle v. Perkins*, (v) there were limitations, by will, of realty, in strict settlement; and a power of sale was given to the trustees, to be exercised, *with the consent of the persons for the time being entitled in possession to the devised estates*, and, in case of their being infants, *with the consent of their guardians*. The trustees sold under the Power, during the life, and with the consent, of the first tenant for life. The purchaser having refused to complete his contract, without the sanction of a Court of equity, on the ground of the doubt as to the validity of the power, Sir *L. Shadwell*, V. C., held, that the power of sale was valid, and decreed the purchaser to take the title.

Powis v. Capron, (w) a case nearly similar, was decided, by Sir *J. Leach*, in the same manner.

In *Boyce v. Hanning*, (x) by a marriage-settlement, real estate was conveyed to trustees, to the use (after the solemnization of the then intended marriage,) of the settlor, for life, with remainder, to trustees, to preserve contingent remainders, with remainder, to the intent, that the settlor's then intended wife should take an annuity, for her life, and subject thereto, to the use of the children of the marriage, as the settlor and his wife should appoint, and in default of appointment, as the survivor should appoint, and in

(u) See Hargr. Accum. 93, 94, n.

(w) 4 Sim. 138.

(v) 4 Sim. 135.

(x) 2 Cr. & Jerv. 334.

default of such last-mentioned appointment, to the use of the children, *as tenants in common in fee*, with a cross-limitation, in fee, between them, in case of the death of any of them under twenty-one. The will, also, contained a power, for the trustees, *with the consent of the settlor and his wife, and the survivor of them*, and after the decease of the survivor, *at the discretion of the trustees*, to sell the estates. The trustees contracted to sell the settled property, under the power, *in the lifetime of the tenant for life*; but the purchaser having excepted to the title, a case was sent to the Court of Exchequer, upon the question, whether the trustees were able to make a title, under the power of sale. It was contended, for the trustees, that the power was good during the life of the tenant for life, although void afterwards; there being, in fact, two powers, one to be exercised during the life of the tenant for life, with his consent, and the other, after his decease, without any consent. It was, also, said, in support of the title, that the power was given to the trustees for the time being, and not, to the trustees, *nominatim*, and, therefore, existed only during the trust, which was to continue for the life of the tenant for life, and the minority of the children, so as to be within the limits of the Rule against Perpetuities: the settlement did not impose upon the trustees any act, after the attainment of majority by the children, as the children were to take absolutely at twenty-one. It was argued, for the purchaser, that it was impossible, to split the power into two, it being given under one limitation, not to be exercised in a different manner under different circumstances; and that, therefore, it was clearly void, as violating the Rule against Perpetuities. It was, further, said, on the same side, in reference to the continuance of the trust, during which the power was to be exercised, that a child might die under twenty-one, leaving issue; in which case, the power would, clearly, continue, and that the argument might be carried further, by supposing an-

other generation; but that it was sufficient to put the case of two minorities, which might keep up the power beyond lives in being and twenty-one years. The Court sent their certificate, to the effect, that the trustees might make a good title to the purchaser, under the power of sale.

In *Waring v. Coventry*, (y) there was a settlement, by deed, of realty, in strict entail, with a power of sale, given to the trustees, to be exercised, *with the consent of the persons for the time being entitled to the possession of the estates*, and, during the minority of such persons, *at the discretion of the trustees*. The settled estates having been directed to be sold by a decree, (whether, or not, in the lifetime of the tenant for life, does not appear,) an objection to the title was taken, on the part of a purchaser, on the ground, that the power was void, as extending to an indefinite period of time. Sir *John Leach*, M. R., held, that the power was co-extensive only with the estates-tail, and might, like them, be destroyed; and that it did not, therefore, fall within the Rule against Perpetuities.

In *Wood v. White*, (z) a testator, by his will, after giving his wife, a life-interest in a portion of his real and personal estate, and after disposing of three one-fifths of his residuary real and personal estate, gave another one-fifth, in trust for his son, W., for life, and after his death, in trust, to convey and assign to his children, their heirs, executors, and administrators, subject to a cross-limitation, between the children, in the event of any of them dying under twenty-one, without leaving issue, and a limitation-over, in case all the children should die under twenty-one, without leaving issue. Another one-fifth was given, in trust, to be conveyed and assigned to the testator's daughter, E., on her attaining twenty-five, or marriage. The will contained a power, for the trustees, during the life of the testator's wife, or at any time afterwards, *during the continuance of*

(y) 1 Myl. & K. 248.

(z) 2 Keen, 664; 4 Myl. & Cr. 460.

the trusts by the will reposed in them, with the consent of the wife during her life or widowhood, and, afterwards, with the consent of the persons for the time being in possession of the rents and profits, or of the authority of the trustees, if such persons should be in their minority, to sell all or any part of the real estate devised. The surviving trustee and executor of the will having, after the death of the widow, contracted to sell a portion of the real estate, an objection was taken to the title, as to the two-fifths devised, as above-mentioned, (there being no question as to the other three-fifths,) on the ground, that the trusts, as to the shares of W. and E., were not then continuing, and that, if such trusts were continuing, they were of a nature to last through a succession of minorities, and that, there being nothing to limit the period within which the power might be exercised, it was void, within the Rule against Perpetuities. Lord *Langdale*, M. R., was of opinion, that the trusts were not continuing, and, therefore, observed, it was not necessary for him to consider the other very important question, which had been argued, as to the validity of the power, on the supposition that the trusts were continuing; and he, accordingly, dismissed the bill for specific performance: but, it appears, from the argument on the appeal, that his lordship intimated serious doubts, whether the power might not be void, *ab origine*, as tending to a perpetuity. The cause coming, by appeal, before Lord *Cottenham*, C., it was insisted, that, by the death of one of the children of W., under age, leaving issue, the trusts might continue, and, with them, the power, for an indefinite period, and during a series of minorities, in which case, the power would be bad; and, if bad to the extent to which it was given, the Court could not moderate it. The Lord Chancellor differed from the M. R., in reference to the period of the continuance of the trusts, and held, that they did not determine, as to one share, until all the children of W. attained twenty-one, and, as to the other share, until E.

attained twenty-five; and, being of that opinion, his lordship observed, the objection raised, as to the power tending to a perpetuity, might be considered as disposed of: but, if it were otherwise, *the sale in question was within the permitted period, and there would not, he thought, be much doubt of its validity, until the expiration of that period.*

In *Wallis v. Freestone*, (a) an estate was devised to O. W., for life, with remainder, to trustees, to preserve contingent remainders, with remainder, to the first and other sons of O. W., successively, in tail, with remainder, to the trustees, and their heirs, in trust for the separate use of the testator's niece, for her life, with remainder, to the use of her children, in tail, with remainder, to the testator's right heirs. A power of leasing the devised estate was given *to the tenant for life, and, after his decease, and during the minorities of the issue in tail, to the trustees.* The trustees having entered into an agreement for a lease, under the power, with the concurrence of the first tenant for life, a bill was filed for a specific performance of the agreement, which the purchaser had refused to complete, on the ground of the power being indefinite, and, therefore, void. It was held, by Sir L. Shadwell, V. C., that, though the power was given for an indefinite period, yet, as either of the tenants for life might concur with his or her children, in destroying it, the objection to the power, on the ground of perpetuity, could not be sustained; and specific performance of the contract was, accordingly, decreed.

Cases on
indefinite
Powers of
sale, &c.,
reviewed.

In the foregoing case of *Biddle v. Perkins*, it will be perceived, that the power was, *at no time*, exercisable without the consent of the parties beneficially entitled. In *Boyce v. Hanning*, *Wood v. White*, and *Wallis v. Freestone*, and (in all probability) *Waring v. Coventry*, the

(a) 10 Sim. 225. The case of *Doe d. Davies v. Davies*, 1 Q. B. 430, has also been cited, (see 2 Jarm. Wills, Index, xiv.) as an authority, ap-

plicable to the question of the validity of unrestricted Powers of sale; but there seems little or no ground for that conclusion.

power was exercised within the period, or under the circumstances, during, or in reference to, which, a *consent*, by the person interested, was required, by the terms of the power; and within or under which, therefore, the power might properly be deemed free from all objection of remoteness. In *Biddle v. Perkins*, *Waring v. Coventry*, and *Wallis v. Freestone*, *estates-tail* were limited, by the settlement or will creating the power; and, therefore, without regard to any consent required to the exercise of the power, it was, so far as it might be deemed collateral to or co-extensive with the estate-tail, clearly valid; whatever might be its character, *dehors* or subject to that estate.

It will be observed, that, in none of the cases cited, is there any instance of the exercise of a power, created in a simple conveyance *in fee, unrestricted*, and *requiring no consent* by the beneficial owner: the power, in the case of *Boyce v. Hanning*, being exercised within the period *during which consent was necessary*; although, after the expiration of such period, the power was of the character alluded to; and the power, in the case of *Wood v. White*, requiring consent, except only in the event of the infancy of the persons interested, and not being, therefore, affected by any remoteness, which might attach to it, in that event, during the period of its exercise being made dependent on consent.

It will, also, be perceived, that no one of the cases cited was decided on the questionable ground of the *actual exercise* of the power being within the allowed limits, without regard to any consideration of consent originally required to such exercise, or of the power being collateral to estates-tail. It is true, that, in *Wood v. White*, Lord *Cottenham* expressed an extrajudicial opinion, implying, that, had the case called for it, the actual exercise of the power might have been sustained, as having taken place within the proper period. But, this opinion may well be conceived

not to have been the result of much special consideration ; as it was clear, that the construction, ruled by his lordship, in reference to the period of the continuance of the trusts, (with which the duration of the power was coextensive,) prevented any question of perpetuity arising ; and, especially, as the circumstance of consent being required to the exercise of the power, in every case, but that of the infancy of the parties beneficially interested, may have occasioned an oversight of the fact, that that was the actual state of things, in which the question arose, and may have, therefore, impressed his lordship with a conviction of the validity of the power.

The deficiency in express authority being thus ascertained, it remains, to point out those rules, on the subject of the limitation and exercise of Powers, of the class under consideration, to which, an examination of the principles of the laws of remoteness, combined with a regard to the limits and restrictions established by decided cases, seems to lead. The positions that follow are not all advanced, as indubitable ; nor is it pretended, that the question of the validity of unrestricted Powers of sale, &c., as presented in any supposable case, is entirely extricated from difficulty : but, it is confidently presumed, that the rules laid down approach as near to a systematic exhibition of the operation of the Rule against Perpetuities, upon these Powers, as the unsatisfactory state of the authorities permits us to suppose, at present attainable.

Powers not extended to representatives of donee, cannot be too remote.

1. There can be no objection, on the ground of remoteness, to unconfined Powers of sale, exchange, partition, and the like, when limited to a person *in esse*, or several of such persons, and the survivors and survivor of them, and *not extended to their representatives*. In such case, they resemble a Springing Use or Executory devise, to arise within the compass of a life in being ; and, like those Executory limitations, they, in no degree, transgress the perpetuity-

boundary. The Powers, therefore, of which future mention is made, will be understood to mean, such as are reserved or limited to persons, and their representatives.

2. It is conceived, that a special Power, limited in a simple conveyance in fee, *to be exercised with the consent of the beneficial owner for the time being*, is entirely valid, and may be exercised, at any time, unless such an exercise be precluded by the act of the person, whose consent is necessary. This rule arises from the conspicuous circumstance, that, the concurrence of the party interested being requisite to any disposition under the power, it may be, at any time, destroyed by him; as the rule, that a person must not derogate from his own act, will not allow a man to avail himself of a power with which he is intrusted, to the detriment or disadvantage of rights conferred, or interests created, by him, in another capacity. The power of sale, or other power, therefore, does not operate as any impediment to the alienation or settlement of the property, and, consequently, offers no violation to the laws against remoteness. In confirmation of this view, the opinion of the Commissioners on the law of Real Property may be adduced: they considered, (b) that, "if an estate be limited to the use of A. B., and his heirs, with a power, reserved to C. D. and E. F., and the survivor of them, and his heirs, to sell or exchange, with the consent of A. B., or the persons for the time being entitled to the ownership, there seems to be no ground for considering this objectionable, on account of its tending to a perpetuity; for the conveyance of the estate, by the person entitled to the ownership, would, in effect, destroy the power, as he could not afterwards consent to the exercise of the power; that is to say, he could not defeat his own act or conveyance, by a subsequent exercise of his power."

Powers requiring consent of beneficial owners, valid.

3. But it seems equally certain, that a Power of sale, or any other Power of that class, limited in a conveyance *in fee*, or in a settlement, whereby no estate-tail is created,

Unrestricted Power, limited in conveyance in fee, and not

requiring
consent of
beneficial
owner, void,
upon principle.

without any restriction upon the period of its exercise, and *not requiring the consent* of the person for the time being entitled, is wholly void. No act of the beneficial owner being available to over-ride the power, it hangs suspended over the fee, like an unbarrable Executory devise or Springing Use ; and, its exercise not being restricted within due limits, it must, (it should seem) like those limitations, also, in similar cases, be void for remoteness.

Here, indeed, the *vexata quæstio* of the *pro tanto* validity, or *in toto* remoteness, of the power, arises. If, in any case, an unconfined power, not requiring the consent of the persons entitled to the ownership, and not collateral to estates-tail, can be, to any extent, good, such, it is evident, must be powers, of the class supposed. It may, then, with little hesitation, be admitted, that, *upon strict principle and analogy*, a bare naked power, reserved on a conveyance in fee, to a stranger and his heirs, must be treated as wholly invalid, on the ground of remoteness. From this conclusion, there is, clearly, no escape, which, upon examination, will not be found to resolve itself into a sophistical evasion, resting solely on considerations of *convenience*, or originating in a desire, to avert the evils consequent upon the rejection of a different practice, long prevalent. For, as it has been, once and again, said, wherein consists the difference, between direct Executory limitations, and Powers of sale and other Powers, of a similar nature, but in the circumstance, that the latter leave the creation of the future interests, to the intervention of a person invested with a discretion to that end ? and how does this difference affect the connexion of each, with the laws against remoteness, seeing that they are alike directed to objects within the scope of those laws ? and, if equally embraced by the provisions of the perpetuity-rule, must not their *original form and character* supply the required restrictions ? and must not the result of the absence of such restrictions be, in both alike, the invalidity, *ab origine et in toto*, of the future limitation and power ?

Considerations, such as these, seem to have influenced the Real Property Commissioners, who lay it down, (c) that, "if an estate were settled to the use of A. B., and his heirs, with a power of sale or revocation, reserved to C. D., and his heirs, without requiring the consent of A. B., or the person for the time being entitled to the beneficial ownership, to the exercise of the power, this would have a direct tendency to a perpetuity, and would, it is conceived, according to the present state of the law, be void;" although the learned gentlemen add, that they "are not aware, that it has been so expressly determined."

The indefensible character, then, in point of principle, of unlimited Powers of sale, and other similar Powers, reserved on conveyances in fee, or on settlements, not creating any estate-tail, and exerciseable without consent, being ascertained, it may be inquired, whether there be any extrinsic considerations, sufficiently potent, to form a plausible justification, for an exception, *quoad hoc*, from the rigid demands of the perpetuity-rule; and, if so, to what cases, such considerations extend.

Now, it is manifest, that, regarded as a question of convenience, simply, that of the validity or invalidity of an unlimited power, must be materially affected by the circumstance of its presenting a definite object, to be accomplished by its exercise, as contra-distinguished from a bare naked power, destitute of any connexion with an ulterior purpose, and serving no ostensible end, beneficial either to the person entitled to the ownership, or the individual invested with the power. A power, for instance, to executors, to sell real estate, for the *satisfaction of debts*, or *legacies*, or for the purpose of realizing a *fund, to be distributed* in a particular manner, or to be consolidated with a testator's general estate, is, to all intents and purposes, a trust, for the execution of which, the parties to be benefited by it, would,

Actual exercise of indefinite Powers of sale, for raising fund for payment of debts and legacies, or for distribution, &c., may be supported.

doubtless, have a remedy ; unless, indeed, in the case of an absolute discretion being vested in the donee of the power ; and, even in such case, also, when a *necessity* for the exercise of the power has arisen, and the charges or sums, secured under the power, are, in other respects, legal demands.

Thus, a learned author has remarked (d) :—"In practice, it often occurs, that a sale is made under a will which empowers the testator's trustees, and the survivor, and the heirs of the survivor, to sell his real estate, (most commonly, his copyholds, in order to avoid the necessity of the trustees being admitted previously to a sale,) without any restriction in point of time. If a Court of law regarded the power abstractedly from its purposes and objects, it must necessarily hold the power to be void, as infringing the Rule against Perpetuities ; but, in all probability, the same anxiety to uphold titles, and make the actual law conform, as nearly as possible, to the opinion and practice of Conveyancers, to which, probably, we may ascribe the recent determinations, would induce a Court of law, to look at the purposes for which the power is to be exercised, and, if it perceived in those purposes, a *sufficient security against the danger of perpetuities*, in other words, if there was in any person *an actual right to enforce the sale*, (as, where it is to be made for the purpose of paying debts or legacies, or the like,) the power, though, in terms, unrestricted and indefinite, would be held to be good. The manner in which the objection to the validity of indefinite Powers of sale in settlements was disposed of in the recent cases, leaves us no room for doubt on this point."

The justice and weight of these considerations can receive no confirmation from the writer's pen ; but he ventures to predict, that, should the question ever call for judicial notice, the Courts will support the *actual exercise* of the

(d) 1 Jarm. Wills, 250. And see 1 Jarm. Pow. Dev. 250, n.

class of Powers referred to, if made within the limits of perpetuity; although violation will thereby be offered to the integrity of one of the accessory rules of remoteness, which requires every limitation of a future interest, in its original form and nature, to be such as will *necessarily* take effect, if at all, within the prescribed period. It may be observed, that the view, here taken, of the influence of considerations of convenience, upon the question of the remoteness of Powers, is confirmed by the Real Property Commissioners, who remark (e):—"A power of sale, for raising money for payment of debts generally, does not seem to be within the reasons of the Rule against Perpetuities."

But, if an equitable regard to the purposes and objects of unlimited Powers shall be considered sufficient, to exempt them, in some cases, from the full rigor of the Rule against Perpetuities, it is clear, that the absence of any definite purpose, to be effected by the exercise of a power, leaves it exposed to the application of that Rule, unmitigated and unrestrained by any considerations of expediency or convenience. It seems, in that case, to be attended with all the injurious consequences of remote Springing and Shifting Uses and Executory devises, without a similar pretext of the personal benefit of the donee.

But, independently of the objection presented, by sound *principles* of law, to a modification of the unlimited Powers in question, there is another, which seems to be almost inseparable from the practical *application* of any such doctrine. The period, during which, if at all, a power could possibly be exercised, is that of one or more life or lives in being and a term of twenty-one years. Now, it may be asked, *what lives* are to be selected, for the purpose of forming a portion of this period? those of all persons in existence at the creation of the power? of the immediate donees of the power? or, of what other person, or body of

Naked powers not supportable upon any grounds of convenience.

Practical objection, in reference to perpetuity-period, it being impracticable to select any lives, to form a portion of it.

persons? and would not the selection of any particular life or lives be arbitrary and insupportable? And, again, if it be clear, that the extreme period of lives in being and twenty-one years cannot be resorted to, for the purpose of supporting an exercise of the power, upon what ground, can a portion of that period be subtracted, and the power be held good, if exercised *within an insulated term of twenty-one years*? That term is an integral part of the period of remoteness, and not supplemental to it; and, although a limitation may be *expressly* made, to take effect within twenty-one years, simply, and will be good, if it actually do so; yet, when *no limit at all* is fixed, it is difficult to understand, how anything less than the whole allowed period, considered as one substantive and complete term, can be made available; and, if from the nature of the case, that be impossible, all effort, to support the actual exercise of an indefinite power, seems to fail.

It is true, these last considerations affect alike *all* unlimited Powers, whether naked, or serving an ulterior end, as the payment of debts, or the like; but, if the latter are to be considered, as exempted from the rigid requirements of the perpetuity-rule, it is highly improbable, that some equally convenient mode of avoiding the practical objections alluded to would not be discovered and judicially recognized. Perhaps, indeed, the Courts might consider the grounds, for supporting Powers of the latter description, sufficiently strong, to justify their being regarded as not admitting, practically, and in reality, of any objection of remoteness, and, so, to exclude them entirely from the operation of the Rule against Perpetuities.

Powers of sale
in mortgages
not open to
any objection of
remoteness.

Before quitting this subject of unlimited Powers declared on conveyances in fee, notice must be taken of a class of such Powers, which, on account of their being always subject to be defeated by the beneficial owner, (although, not in consequence of any express reservation of consent,) or, rather, on account of the nature of the object of the power

presenting a guarantee against undue remoteness in its execution, are, clearly, unaffected by any objection on that head. The Powers in question are the common *Powers of sale*, reserved to *mortgagees*, and their heirs, or executors and administrators, as additional security for the repayment of the principal-money and interest. These Powers, unquestionably, do not operate as a clog upon the alienation of the property, because it is always open to the mortgagor and his representatives, until foreclosure, by redeeming the mortgage, to claim a reconveyance of the property, and, thereby, to put an end to the power: and, if the mortgagee foreclose, the power, of course, immediately ceases, and, with it, the rights of the mortgagor; in respect of which only, any question of remoteness can arise. It has been well observed (*f*) of these Powers,—“The ownership is merely incumbered, and that incumbrance is fortified by a power of sale, but which power is accessory only to the main purpose—that of securing the money. The whole effect of the transaction is a pledge, with a power superadded, to render that pledge more available. There is nothing, which can be construed into an attempt to set the ownership afloat, beyond the period permitted by law, or, in other words, to create a perpetuity. Whether the power be given to the mortgagee, or, to a third person, and whether the power be wholly unclogged, *quoad* the purchaser, by the requisites of default in payment, notice, &c., will make no difference; for, as, in equity, the mortgagor may, in either case, put an end to the charge, and, with it, the power, and, in the meantime, prevent or punish an undue exercise of it, the duration of the power is, in fact, limited, and its execution checked, by the very nature of its object.”

4. It follows from the principles, on which the doctrine secondly above laid down is grounded, that an unrestricted power may be limited, by a deed or will creating *limitations*

Powers declared on limitations in strict settlement,

(*f*) 1 Jarm. Pow. Dev. 250, 251, n.

requiring consent of beneficial owners, entirely valid.

in strict settlement, if the *consent of the persons for the time being in possession* under the limitations be required to the exercise of the power; and this rule will hold, as to all the estates created, as well estates-tail, as the *ultimate remainder in fee*. In such a case, it is obvious, that the tenant for life and the first tenant in tail, by concurring in a disentailing assurance, or the tenant in tail alone, after the decease of the tenant for life, may, at any time, destroy the power, by depriving themselves of the liberty of consenting to its exercise. And, after the determination of the estates for life, and the remainders in tail, the power is equally subject to any alienation of the remainder-man in fee, inconsistent with its exercise. Thus, the Real Property Commissioners (g):—"If an estate be limited to the use of A. B., for life, with remainder, (in the usual way of settlements,) to the use of the first and other sons, successively, in tail, with remainders-over, of a similar nature, with the ultimate remainder, to C. D., in fee-simple, with a power of revocation reserved to some other person, but not to be exercised without the consent of A. B., or the person entitled to the freehold or inheritance, this power seems not to be against the rule of perpetuity, for a recovery by the first tenant in tail in possession, or a common conveyance, after the determination of the preceding limitations, by the remainder-man in fee, would prevent any subsequent exercise of the power."

Powers declared on limitations in strict settlement, though not requiring consent, valid as to life-estates and estates-tail.

5. Again, a power given by deed or will, creating *limitations in strict settlement*, whether it is to be exercised with the *consent of the parties beneficially interested*, or not, is valid, as to the estates for life and in tail; but is wholly void, as to the *ultimate remainder in fee*, if unrestricted, and not requiring the consent of the person to whom that remainder is limited (h). The reason of this is, that the power must be good as to the estates for life, because they are within

(g) 3 Rep. 34.

(h) 2 Prest. Abst. 158.

the rule; and, as to the estates-tail, it is, with all other Executory limitations, liable to be defeated by the disentailing assurance of a tenant in tail; while, as to the remainder in fee, it is, like every other such power similarly circumstanced, and not given for a particular purpose, necessarily, void.

And the same rule holds with regard to Powers, which are to be exercised with the *consent of the tenants for life*, and, also, of the *tenants in tail*, when of *full age*, but which, *during the minorities* of the persons for the time being entitled, are to be exercised, at the *discretion and of the authority of the trustees*. So far as such a power is to be exercised without consent, it is similar to a power, to the execution of which, consent is, in no case, required, and its validity, therefore, must, to that extent, be determined upon the same principles. It follows, consequently, that the power is perfectly valid, as to the life-estates and estates-tail; but, as to any remainder in fee, it will be void, so far as it is exerciseable without the consent of the person entitled thereto.

If no consent required during minorities of tenants in tail, power equally good.

In regard to the destructibility of these Powers, during the life of a tenant for life, by means of his concurrence with the remainder-man, in destroying the entail, a distinction is to be noticed, between cases, where no consent is required, and those, last stated, where the consent of the beneficial owner for the time being is necessary to an exercise of the power. Where the power does *not* require a consent by the parties beneficially entitled, it would seem, that, during the continuance of the life-estate, a tenant in tail cannot, by concurring with the tenant for life, in a destruction of the entail, annihilate the power, because, previous to the time fixed for the estate-tail to take effect in possession, the power has priority, in respect of its capability of being exercised, before that period; and it is not in the power of the tenant for life, (as his consent is not required,) by joining in a disentailing assurance,

Difference, as to destructibility of power during continuance of life-estate, when consent of beneficial owners is, and when it is not, required.

with the tenant in tail, to prevent the power being exercised during the continuance of the life-estate. (i) But, if the consent of the tenant for life *be* required, then, his concurrence with the remainder-man in tail, in barring the entail, will effectually destroy the power, although the consent of the tenant in tail be not required; because the concurrence of the tenant for life precludes an exercise of the power, during his life, and, as to the estate-tail, after the determination of the life-estate, it is co-equal with the power, and, from that period, its previous destruction begins to operate, and prevents the power being exercised. It must be remembered, however, that, as the concurrence of the tenant for life in barring the entail, can only affect the power, by destroying the right of consent, subject to which the power is created, this consequence will be avoided, as well as the merger or determination of the life-estate, if the tenant for life merely concur to give his assent to the barring the estate-tail, as protector of the settlement, under the act for abolishing fines and recoveries. Under the former system of fines and recoveries, too, the destruction of the power of consent of the tenant for life might have been avoided, with all the certainty of technical accuracy, by conveying to the tenant to the præcipe, such an estate, only, as would leave a reversion in the tenant for life, to which that power would continue attached, and which, either, by force of a condition, or, by a proper declaration of uses, accompanied with merger, might be reduced into possession after the recovery. (k)

Powers limited to persons unborn open to objection of remoteness, although not extended to their representatives.

6. It would seem, that the different rules, with respect to the validity of unrestricted Powers, when limited to persons *in esse*, and their representatives, are of equal force, as applied to limitations of such Powers to *persons unborn*, simply, without being extended to their representatives. The danger being, in both cases, the same, *viz.*, the possi-

(i) See Burt. Elem. Comp. 272. But the learned author does not seem to have observed or recognised the

distinction taken in the text.

(k) Burt. Elem. Comp. 272, n.

bility of the exercise of the power beyond the allowed limits of remoteness, the remedy, upon whatever principle regulated, must be the same, also. Were there, in the nature of the case, any greater tendency to a perpetuity, in the limitation of a power to a person unborn, than, in such a limitation to a person *in esse*, and his heirs, or his executors and administrators, there might be ground, for requiring every such power, as originally limited, to conform to the Rule against Perpetuities. But, such not being the case, it is clear, that all the safeguards which we have seen to exist, in the case of Powers limited to persons *in esse* and their representatives, in the nature of consents, liability to destruction by tenants in tail, and (possibly) specific objects to be accomplished by the execution of Powers, equally argue, in similar cases, against any remote tendency in unrestricted Powers, limited to persons unborn.

7. A class of Powers remains to be considered, to which little attention seems to have been given, in connexion with the laws against remoteness. The Powers in question are Powers of *determining terms or other like estates*, valid in their creation, on future contingent events, which may possibly happen after the expiration of the period prescribed by the Rule against Perpetuities. Of these Powers, the Real Property Commissioners thus remark (1) :—"If an estate be limited to A. B., for a term of one-thousand years, so as to vest the absolute legal and equitable interest in him, with remainder, to C. D., and his heirs, with a power, reserved to the same C. D., and his heirs, to revoke or determine the term, there is reason to suppose, this power would be void ; for the power might be exercised, after the period fixed as the boundary for perpetuities."

Powers of determining terms, &c., on remote contingent events.

That such Powers are within the reason of the Rule, seems scarcely to need remark ; as whatever tends to suspend the absolute vesting of interests, is, obviously, among

(1) 3 Rep. 34.

the objects, against which the Rule for the prevention of Perpetuities is directed; and it is plain, the acquisition of the absolute ownership is equally postponed, whether the *first taking effect* of a limitation depend on some antecedent event, or its *continued enjoyment* be liable to interruption, from the exercise of a power, vested in some other person.

The difference, however, between the two cases, is, that, whereas, if a limitation depend on a condition precedent, any remoteness in the contingency wholly invalidates the gift expectant upon it, the effect of the Rule against Perpetuities, in the case of an estate or interest, already vested, being made liable to be defeated, by a power of revocation which is too remote, is, simply, to disencumber the limitation, of the void superadded power. And, if the question be, whether a power of revocation, such as that referred to, is void, as too remote, it seems only necessary, to observe, that, if it be limited to a person and his representatives, and do not serve any legal ulterior purpose, (such as, the payment of debts, or the like,) it must, upon the general principles of the law against perpetuities, be regarded, as transgressing (in that, it is not confined to,) the allowed limits, and as, therefore, void. And, consequently, it is apprehended, that a power of revocation of a term, limited to a stranger and his heirs, or executors and administrators, in the event of the donee of the term dying without issue generally, (supposing the case not comprehended by the recent enactment of 1 Vict. c. 26, before considered,) or any other event, not necessarily happening within the prescribed period, would be void, as too remote: although it seems clear, that there is no objection, in point of remoteness, to the limitation of a term of years, determinable (*by the original form of the limitation,*) on the indefinite failure of the termor's issue, or on any other event.

As to remoteness of Powers, in reference to terms created

But, it seems questionable, whether the same considerations of convenience, which we have seen to have place in regard to some Powers of sale, and the like, would not be

allowed to uphold Powers of revocation, of this kind, if it should appear, that the *term was created for a temporary purpose*, (as, for securing a jointure, or, raising younger childrens' portions, or, otherwise, as a security for the payment of a sum of money,) and a power of revocation, as to which, therefore, could not be exposed to any question of remoteness. Thus, the Commissioners on the law of Real Property, after the paragraph last above quoted, remark, as follows (m):—"The case seems to be essentially different, where, in the usual way of marriage-settlements, a term of years, preceding all the other limitations, is limited to trustees, for a particular purpose, connected with the other limitations in the settlement, and, usually, with a provision for the ceaser of the term, when the purpose, for which it was created, has been effected, (as, a term, either, for securing a jointure, or, for raising portions for younger children,) subject to a power of sale and exchange, to be exercised only with the consent of the beneficial owner, and which power, if exercised, would, of course, over-reach all the preceding limitations. This power can scarcely be said to have any tendency to a perpetuity, as defeating the preceding term; for, in the former case, the term must determine with the death of the jointress, and payment of the arrears, if any, of the jointure, and, in the latter, upon payment of the portions; and, if it be alleged, that the payment of the arrears of the jointure, in the one case, and, of the portions, in the other, may protract the duration of the term beyond the limits of the restraint upon perpetuities, so as to render it, in effect, an absolute term, the proposition may be denied, because the mere circumstance, that the arrears and portions may not be raised or paid, for a period beyond a life or lives in being, and twenty-one years afterwards, if they were, (as they must be) necessarily raisable and payable within the term, or immediately on the

in marriage
and other
settlements.

(m) 3 Rep. 35.

expiration of it, does not render the trust for raising them, void in equity; and, if the trust be not void in equity, how can the cesser of the term, upon the same event, be deemed too remote, at law. The rules of law and equity, so far as they concern perpetuities, do not, we apprehend, differ. From these observations, it may be inferred, that the power, in the case put, is not void, *ab initio*, by reason of its tendency to over-reach a preceding term, and, if so, it cannot, as it is conceived, be void, by the term afterwards becoming absolute, by alienation, as, by a sale for the purpose of raising the money secured by it. The exercise of the power cannot afterwards defeat the term, made absolute by alienation; but the power may, nevertheless, be exercised, in respect to the other limitations, but subject to the term; as, in the case, where a tenant for life, whose consent is necessary to the exercise of a power, makes a lease, there, the subsequent exercise of the power cannot over-reach the lease. Supposing, however, that the term be, in its creation, absolute, or without any clause of cesser, yet, considering, that it is a mere security for the payment of a sum of money, and that, subject to that charge, and until the term is absolutely aliened for raising the money, the term is consolidated with the other limitations in the settlement, and attendant upon them, there seems to be no substantial objection to the power, on the ground of perpetuity."

It will be observed, that the argument, against any tendency to a perpetuity, in the power, in the case put by the Commissioners, is rested, not, on the impossibility of an exercise of the power, beyond the allowed limits, but, on the circumstance of the object to be effected by the term being such, that it cannot reasonably be supposed, the term itself will endure, for any influential or efficient purpose, (designed in its creation) longer than the prescribed period of perpetuity. If such be the character of the term, it is manifest, all objection to the power of revocation, on the score of remoteness, so far as that power affects the term,

is, "substantially," removed; although, it must be admitted, that, if the term be absolute or not liable to cesser, it seems difficult to regard it, at law, as other than a term for the full number of years, for which it is limited, without regard to the character of the particular objects contemplated in its creation. The circumstance, also, that the term is consolidated with the general body of limitations in the settlement, and inserted and located, with especial regard to the objects to be effected by it, greatly tends, in an equitable point of view, to place the term on an equal footing with the other limitations, in regard to their connexion with the power, and, therefore, to render the latter valid, as respects the term, if it be not void, as to the other limitations with which it is associated or concurrent.

Upon the whole subject of these special Powers, as affected by the Rule against Perpetuities,—it must be admitted, that a strong disposition is discernible, in our judges of law and equity, towards a moderate relaxation of the established principles of the laws against Perpetuities, in favor of unlimited Powers, when their actual exercise is confined within legal limits; although, as all bounds to rules, founded on notions of expediency only, are merely arbitrary, it is impossible to say, how far a respect for past professional laxity, and general convenience, may lead to a disregard of the strict line of principle and analogy.

General
observations as
to unlimited
special
Powers.

CHAPTER XXVI

OF THE RULE AGAINST PERPETUITIES, AS IT AFFECTS THE
IMPLICATION OF ESTATES.

No legal
implication can
be made
inconsistent
with the Rule
against
Perpetuities.

As the system of law is harmonious, and regardful, in each of its branches, of the principles on which others are based, it follows, that no estate or interest can be created by mere operation of law, or, as it is termed, by *implication*, which would be void, as too remote, under the Rule fixing bounds to *express* limitations of future interests. The policy of law, which, in support of a liberal construction of the intention of testators and others, raises estates upon implied gifts, cannot, consistently with a wise regard for the proportions of the jurisprudential system, be permitted to have course, if the application of it, to any given case, would induce an infringement of that universal boundary to the creation of interests, suspending the acquisition of full power over property, ascertained and fixed by the Rule against Perpetuities. How strong soever the presumption, therefore, or, however calculated to promote, what may be presumed to have been, the designs of the author of the limitations, or, to support and complete his general dispositive scheme, it must ever be a sufficient answer to any attempt for giving it effect, that it will involve a disregard of the landmark which binds on all sides the settlement of every species of property. (n)

(n) 1 Jarm. Wills, 260.

And this principle is as easy, in its practical realization, as it is simple, in itself. The effect of the application of the laws against remoteness, to any particular case of express gifts, has but to be discovered, and the extent, to which the *implication* of a like estate or interest, under similar circumstances, may be affected by it, is immediately ascertained. Whether this, or what other, circumstance has occasioned the scarcity of authority which characterizes this department of the law of perpetuity, it is unnecessary to inquire: it may suffice to know, that, from the nature of the doctrine, little, if any, difficulty can ever occur, in the way of its practical application. Whatever the doubt be, it will ensue from, and be indetical with, that which may attend the primary question of the remoteness of an *express* limitation, similar to the one sought to be implied: that removed, and the subordinate difficulty also ceases.

The only authority, at all bearing on the question, is a case, (o) in which a testator gave his estates, to his nephew, W. B., eldest son of his brother, R., and his assigns, for life, remainder, to his first and other sons, in strict settlement, and for want of such issue, then, to the second son of his said brother, for life, and after the death of the said second son, then, to the first son of the body of such second son, and to the heirs male of the body of such second son, lawfully to be begotten, and for default of such issue, to the third, fourth, and fifth, and every other son and sons of the said second son of the said R., according to their seniority, and to the heirs male of the body of the third, fourth, fifth, and other sons of the said second son. The testator declared, that the reason of his settling and limiting his estates as aforesaid, was, because he desired to have the same continue in his name and blood. The testator's brother had only one son, W., born in the testator's lifetime; but a

Case of
*Chapman d.
Oliver v.
Brown.*

(o) *Chapman d. Oliver v. Brown*, 3 Burr. 1626.

second son, T., was subsequently born. W. died without issue, upon which T., the second son, entered, and suffered a recovery; which raised the question, whether the second son took an estate-tail, or only an estate for life. It was contended, against the recovery, that T. was only entitled to an estate for life, for that the ambiguity, in the devise, to take place immediately after his death, arose from an inadvertency in transcribing the will; the transcriber having omitted, after the words, "to the first son of the body of such second son and to the heirs male of the body of such," the words, "first son lawfully to be begotten, and for want of such issue, then to the second son of the body of such second son of R., and to the heirs male of the body of such," which, if inserted, would have rendered the clause clear and sensible, and which, it was contended, ought to be supplied, on the evident intention. The Court of B. R. held, that T., the second son, took an estate-tail, and that the limitations, supposed to be left out, could not be inserted; and, in support of this view, it was said, that the limitations *could not be supplied*, as the person, in whose favor the implication was sought to be made, *was the child of a son of T. unborn at the death of the testator*; although, it is true, the Court observed, that, if the omitted limitations could be supplied, the doctrine of *cy-prés* would be applicable, to vest an estate-tail in T., the second son.

With this notice of the only decided case to be found, at all affecting the question, we may close this glance at the operation of the Rule against Perpetuities, upon the raising of estates by implication of law; a subject, which has, indeed, been introduced, rather, out of regard to the theoretic completeness of our view, than, from any novelty of rule or principle connected with it.

Present notice
confined to
implication of

It may be observed, however, that the notice, here taken, of implied estates, (as the learned reader will have per-

ceived,) only contemplates them, as they may *infringe* the Rule against Perpetuities, and not, in connexion with the purpose, frequently served by them, of *preventing* a violation of that Rule; which was formerly seen, when engaged upon the subject of limitations after a failure of issue, and their relation to prior estates, express or implied.

estates violating laws against remoteness.

CHAPTER XXVII.

OF THE RULE AGAINST PERPETUITIES, AS IT AFFECTS
EXECUTORY TRUSTS.

Rules of law
and equity the
same, in
reference to
remoteness,
when limita-
tions complete.

It has been before remarked, and the whole course of this Treatise has illustrated the observation, that there is no difference between the Courts of law and equity, in the administration of the rules restricting the remoteness of Executory limitations. Nor will a Court of equity, where the limitations of trusts are complete in themselves, or, as it is termed, executed, mould, alter, or put a peculiar construction upon them, in order to evade, or preserve the limitations from the operation of, the Rule against Perpetuities: the ordinary principles of interpretation are adhered to, without regard to any consequences that may ensue from the application of a rule, extrinsic to the particular question of construction, and which application must follow, and take place as a consequence of, a construction, previously determined on or adopted, upon grounds peculiar to itself, and of individual and independent force.

But if limita-
tions executory
only, equity
will modify
them, with
regard to laws
against
remoteness.

But, where the settlor or testator has purposeely framed his dispositive scheme after the character, rather, of a declaration, as to what are his general intentions and designs, than, of a series of formal and sufficient limitations, in themselves actually definite, and by their author intended to be complete, then, he seems designedly to leave the office of carrying out and giving effect to his dispositions, to that jurisdiction, which takes cognizance

of matters of trust and agreement, and seeks to discover the real intentions of parties, in their dispositions of, and contracts respecting property. In expressly directing the execution of a formal settlement, or, in leaving such a direction to necessary implication, (either, from the circumstances of the case, or, from the tenor of the instrument,) an intention, by inevitable construction, appears, that what is deficient, informal, and wanting in precision, in the first instrument, should be supplied, remedied, and improved, in the settlement to which it is introductory.

And, further, inference is deducible from this limitation of trusts in the executory form, that the settlor or testator intends his dispositions to be carried out, not only, more formally, but, also, with a stricter regard to legal rules and technicalities; and, yet further, that, should his general scheme of disposition indicate any tendency to a violation of those rules, it may be effectuated as far only as they will permit, and in a manner, to insure the validity of the whole series of limitations, created in pursuance of his general directions, in point of legal accuracy. To suppose a person declaring trusts of this executory kind, desirous of having them specifically carried out, in a manner that would lead to their general or total failure, is to make him desire to do, and not to do, at the same time: an absurdity, to which, not even a manifest tendency to illegality, in the scope of his dispositions, can reconcile us, and which must, therefore, be avoided, by completing his settlement, as near as may be to his intentions, conformably with the rules of law.

Of this kind, plainly, are trusts executory, evincing an intention, on the part of their author, to settle his property, in a manner, which would expose his dispositions, to objection on the score of remoteness. If the direct object and effect of his limitations be not the creation of a perpetuity, but, remoteness attach only to some remoter link in the chain of limitations, there cannot be a doubt, that a Court of equity will carry into effect the general intention, and,

especially, where the expression of that intention is accompanied by some reservation, as to an observance of the limits prescribed by law.

Case of
*Bankes v. Le
Despencer.*

To this effect, is the decision in the case of *Bankes v. Baroness Le Despencer*, (*p*) where T., lord Le D., being seised in fee of the ancient barony of lord Le D., by indenture, together with his son, T. S., (heir to the barony,) conveyed certain real estates, to trustees, to the use of T., lord Le D., for life, with remainder, to the use of T. S., for life, with remainder, to the use of the trustees, in fee, in trust, that they should, after the decease of the survivor of T., lord Le D., and T. S., convey, settle, and assure the estates, to the use of such persons, for such estates, and with such powers, and in such manner, in all respects, consistently with the intent of T., lord Le D., and T. S., that the same estates should, so far as the law would permit, be strictly settled, so as to go along with the dignity of Le D., so long as the person possessed of the same dignity should be a lineal descendant of the said T., lord Le D., and be held and enjoyed by the person for the time being possessed of the same dignity, and being such lineal descendant as aforesaid; and that, during every suspension or abeyance of the same dignity, within the limits prescribed by law for strict settlements, the rents and profits of the same premises should be equally divided amongst the co-heirs, *per stirpes*, of the person or persons respectively, by reason of whose death or deaths without issue male, such suspension or abeyance should be, for the time being, occasioned, as by three counsel in the law, therein specified, should be advised and directed; with a provision, that the trustees should seek the assistance of the Court of Chancery, in case of the referees declining the reference, or not agreeing as to the mode of settlement. The defendant, the baroness Le D., was the only child of T. S., who died before T., lord Le D. On the death of the latter, a reference was made to the counsel named, to ap-

prove of a settlement to be made in pursuance of the trusts of the indenture above mentioned; but, they not agreeing as to the form of the settlement, a bill was filed by the trustees, praying, that the trusts of the indenture might be carried into effect, and that a proper settlement might be executed under the direction of the Court. It was argued, on behalf of an only surviving son of T., lord Le D., that it was impossible to give effect to the intention of the parties, without creating a perpetuity: that if the dignity of Le D. were to become in abeyance, in consequence of a former lord having died, leaving only daughters or the issue of daughters, it might continue in abeyance for more than two-hundred years; and according to the language of the deed, the trust for the co-heirs of the former lord was to continue for the same length of time, and on the abeyance being determined, the estates were to go back with the title: that the intention, expressed with regard to the settlement to be made, was one and entire, and, therefore, that, if it in part exceeded the limits allowed by law, and could not, consequently, be wholly carried out, no effect could be given to any portion of the intention. It was said, on the other hand, that where a trust was executory, the Court, if it could not give effect to it *in toto*, must carry it out so far as it could, consistently with the rules of law and in equity: that, as the parties to the settlement had only required, that their estates should be settled according to a certain course of limitation, so far as the rules of law and equity would permit, the Court, if it made the settlement so far as those rules would allow, did effectuate the intention of the parties. Sir *L. Shadwell*, V. C., after quoting the first part of the trust, down to the words, "and being such lineal descendant as aforesaid," observed, that, if it had stopped there, there would have been no doubt, that the Court would have directed a settlement to be framed, for the purpose of effectuating the general intention of the parties, and cited, in proof of this, the cases of countess of *Lincoln* v. duke of *New-*

castle, Woolmore v. Burrows, and *lord Dorchester v. lord Effingham*, presently mentioned. His honor further observed, the only question was, whether there was any thing in the second part of the direction, which was so illegal as to tie up the hands of the Court, and prevent it from making any settlement: that it was not material to consider, whether the words, "within the limits prescribed by law for strict settlements," ought to be taken in connexion with the words which preceded them, *viz.*, "during every suspension or abeyance of the same dignity," or, in connexion with the words that followed them, *viz.*, "the rents and profits of the same premises shall be equally divided between the co-heirs, *per stirpes*, &c.:" and that, in whichever of those ways, the words were taken, an intention was found, that that division of the rents and profits should continue no longer than the law allowed. His honor then suggested one mode of effecting a settlement which appeared to him unobjectionable in point of law:—"Suppose," said the learned judge, "that the settlement were to be made in this form: *viz.*, that the estates were to be limited to trustees, for a term of one-thousand years, determinable at the end of twenty-one years from the death of the survivor of all the persons *in esse* at the time of lord Le D.'s death, and then capable of succeeding to the dignity, and that, subject thereto, the estates were then limited to the different persons so *in esse* and capable of succeeding to the dignity, for their lives, successively, with remainder, to their sons, in tail, with remainder, to their daughters, in tail; and that, then, the trusts of the term of one-thousand years were declared to be, that, in the event of there being any abeyance, such as is here contemplated, the rents should, during the term, (which could not exceed the limits fixed by law) be disposed of in the manner prescribed: there can be no doubt, that that would be a legal mode of settlement." In pursuance of this decision, a settlement was prepared, by which, effect was given to the trusts, to the fullest extent compatible with the rules of law, (although not in the man-

ner suggested by the learned judge) and a report of the master, approving of the settlement, has been since confirmed, and the settlement itself ordered to be executed. (pp)

This decision is more satisfactory, as an authority showing the inclination of Courts of equity to carry out Trusts Executory not essentially remote, in a manner conformable to the rules of law, than any cases previously decided, inasmuch as the trust in question was, undeniably, such, as, if executed, or carried into effect, *literatim*, would involve a violation of the Rule against Perpetuities: for, although the words, "within the limits prescribed by law for strict settlements," confined the happening of the abeyance or suspension to the proper period, the trust which was to arise on that event was to continue for an indefinite period; and, as to the first part of the trust, it has been already seen, that, although, if executed, it would have been held good, so far as concerned the person first answering the description of successor to the title, it would yet have been void, as to all persons succeeding subsequently, whether *in esse* at the creation of the limitations, or not.

Observations
upon *Banks v.*
Le Despencer.

This is the principal instance of a Trust Executory being carried out by the Court of Chancery, to which, the objection of a direct tendency to remoteness has attached.

There are, however, several other authorities, proving that, in the case of general trusts for the execution of settlements, a Court of equity will, ordinarily, direct a settlement to be framed, for the purpose of effectuating the general intention of the parties, *in conformity with, and so as to preclude all objection from, the rule of law against the creation of perpetuities*; and these, as illustrating the mode in which the jurisdiction of the Court of Chancery, with respect to Trusts Executory, is exercised, it may be well to notice.

The first case is that of the countess of *Lincoln v. the*

Case of
countess of

(pp) See 7 Jurist, 210. See also under the order of the Court, are Appendix, no. III.; where the limitations in the settlement executed stated.

*Lincoln v.
duke of
Newcastle.*

Executory
trusts of
personalty by
reference to
previous limi-
tations of realty
in strict
settlement.

duke of *Newcastle*, (q) where there was a covenant, in a marriage-settlement, to settle leasehold estates, in trust for such persons, and for such or the like estates, ends, intents, and purposes, as far as the law would allow, as were declared concerning certain real estates, limited to divers persons, and their first and other sons in tail-male, with several remainders; and it was held, by Lord *Loughborough*, and, afterwards, by the House of Lords, that the covenant should be executed, by giving the absolute interest in the leasehold estates, to the *first tenant in tail in possession who had attained the age of twenty-one*. The decree, as originally pronounced by Lord *Loughborough*, was to the effect, that, *if the tenant in tail should die under twenty-one without leaving issue male*, (which was the description of issue entitled under the entail created in the real estate,) the property should devolve to the next tenant in tail, with a similar gift-over, as to such tenant in tail, and each succeeding tenant in tail. At the time of the appeal coming before the House of Lords, the expectant tenant in tail had attained twenty-one; and it was, therefore, decreed by that Court, that the leaseholds ought to be settled on him, absolutely. It was observed by Lord *Eldon*, (who was the dissentient peer, Lords *Ellenborough* and *Erskine*, the latter of whom was Lord Chancellor, carrying the judgment,) that, as the decision by the House was framed, it could not serve as an authority, as to what was to be done, under any other circumstances than those of a tenant in tail in possession attaining twenty-one; by which, it is presumed, his lordship meant, that the adjudication only established, *that the title of the next tenant in tail would depend*, simply, *on the first taker not attaining twenty-one*, and not, on the complex contingency of his dying under twenty-one *without leaving issue*; the latter not exhausting the whole allowed period, which, Lord *Eldon* remarked, it was supposed, the Court always availed itself of, in these cases of Executory

Trusts. This, it will be perceived, was not an *argumentum ad rem*, but was merely urged, in opposition to the notion, that the Courts ought, in carrying out Trusts Executory, to *resort to the whole period of perpetuity*; for that thereby the settlor's intention of keeping the estates together was not necessarily effectuated; and, as the Courts could not properly exhaust the prescribed limits, there was no admissible intermediate period to be fixed on; and that, therefore, the property vested in the first tenant in tail, on birth. The answer to this reasoning, however, is, (in the words of one of the reasons for the respondents, in the principal case,) that the intention of the parties, which the Court was called upon to carry into effect, is, *not* to suspend the vesting, to the *utmost extent that might be by law*, but, it was, to settle the leasehold for the benefit of such persons, for such estates, ends, intents, and purposes, as were before declared of the freehold, *so far as the law would allow*; which intention, it is undeniable, is, in such a case, best effected, by permitting the leasehold to vest in the tenant in tail, although dying under twenty-one, *if he leave issue*; as the estate-tail in the realty descends to such issue, and it is the object of the parties, that the two properties shall go together, as far as is permitted by the rules of law. It seems, therefore, to be clear, that, when personal property is limited, by way of executory trust, referentially to previous limitations of realty in strict settlement, "as far as the rules of law and equity will permit," the absolute interest vests in the first tenant in tail attaining twenty-one, or dying under that age, leaving issue inheritable to the entail.

The next case to be noticed is that of *Woolmore v. Burrows*, (r) where a testator disposed as follows:—"The residue of my fortune to be laid out in land, as contiguous as practicable to S., in the county of C., to be *added and closely entailed to the family estate*, now in the possession of my relative, T. B.; until such purchase is made, to allow to T. B. and his lawful heir, 2*l*. 10*s*. per centum, on the

Case of
Woolmore v.
Burrows.

amount of the said residue :” and by a codicil, the testator declared thus :—“ My object, in wishing to improve the S. estate, is, to have a head to the family, who, I hope, will be kind and attentive to the different branches. Should T. B. die without leaving male issue, or dispose of S., out of the family line, it is my desire, that the residue of my fortune should go to A. B., or to his nearest relative in the male line.” At the time of the testator’s decease, the S. estate was settled on T. B., for life, with remainder, to the *first and every other son of T. B., successively, in tail-male*, with remainders, to the daughters, as tenants in common in tail-general, with remainders-over. At the testator’s death, there was a son of T. B. living, named R. B. It being referred to the master, to approve of a proper settlement of certain estates purchased under the directions of the will, he certified in favor of the draft of a settlement, by which, the estates were limited to T. B., for life, with remainder, to R. B., for life, with remainder, to trustees, to preserve contingent remainders, with remainders, to the sons of R. B., successively, in tail-male, with remainder, to a son of T. B., who was born after the testator’s decease, in tail-male, with remainder, to every other son of T. B., successively, in tail-male, with remainder, to A. B., (whose proper name was A. R. B.,) for life, with remainder, to trustees, to preserve contingent remainders, with remainder, to the sons of A. R. B., successively, in tail-male, with remainders-over. To the master’s report, exceptions were taken by T. B. and R. B., to the effect, that the estates ought to have been limited to R. B., in tail-general, or in tail-male, and not, for life only, as it was the testator’s intention, that the estates to be purchased and settled should be added and closely entailed to the S. estate, under the settlement of which, R. B. was entitled to an estate-tail-male. In support of this exception, it was contended, that, if an estate for life in the new estate were to be given to R. B., the two estates might be separated, as R. B., being tenant in tail of the S. estate, might bar the entail of it : that the testator could not intend,

that R. B., the eldest son, should have an estate for life only, and that his younger brother should have an estate-tail. On the other hand, it was urged, that, where there is an intention to entail strictly, all persons born in the lifetime of the testator must be made tenants for life; and that, as to the second son being made tenant in tail, the testator, had he known that that must be the case, would only have regretted, that all the sons could not be made tenants for life. Sir *Anthony Hart*, V. C., observed, that the words, "closely entailed," required the limitations to be *as strict as the rules of the law would permit*; and that every person *in esse* at the testator's death, must take a *life-estate*, and no more; and that, if this exposition of the testator's intention could be deemed conjectural, it was a conjecture, approaching more nearly to a rational construction of intention, than any other which could be imputed. His honor, therefore, thought, that the limitations imposed on T. B. and his issue, by the settlement approved by the master, were not more strict than they ought to be.

A case very nearly similar to the last is that of lord *Dorchester v. the earl of Effingham*, (s) where G., lord D., having settled certain estates on his sons who were living, with remainder, to their first and other sons, in tail, and having reserved to himself a power, to revoke the uses of the settlement, and appoint new uses, by his will, declared as follows:—"All my landed estates *to be attached to my title as closely as possible*; all the timber, wood, and trees, on my estate, I leave to my executors, in trust, to increase my landed property; all debts due to me from government, and all my personal property not otherwise disposed of, I leave to my executors, in trust, to increase my landed property." The next lord D., who was grandson of the testator, filed a bill, praying, that he might be declared to be *tenant in tail* of the settled estates, under the limitations of

Case of lord
Dorchester v.
earl of
Effingham.

(s) 10 Sim. 587, 588, n.; 3. Bcav. 180.

the settlement. Sir *William Grant*, M. R., declared, that, by the effect of the testator's will, the estate-tail of the plaintiff, in the settled estates, and the estates-tail of all the male issue or other descendants of the testator, *in esse* at the time of the testator's death, were *abridged to estates for life only*, with remainders, to their first and other sons, in tail-male, in strict settlement; and it was, also, ordered, that the timber on the settled estates should be cut and sold, and the proceeds be invested in the purchase of land, to be settled to the same uses, as the other estates were settled or subject to, under the settlement, and according to the effect and operation, before declared, of the testator's will; and the residue of the testator's personal estate was to be laid out in the purchase of land, to be settled in like manner.

These cases well establish the distinction, between trusts executory and trusts executed, as to the jurisdiction of Courts of equity, in the case of the former, to give effect to the intention of the author of the settlement, by limiting estates and interests, as strictly as possible, in conformity with the rules of law; although there be no express reservation, providing for a due observance, in the execution of the trusts, of the prescribed limits of perpetuity, nor any general reference to legal rules, such as, "as far as the rules of law and equity will permit."

If direct
object of
Executory
trust be crea-
tion of a
perpetuity, it
will not be
assisted.

Wherever, however, it can be ascertained, that the direct and avowed object of a testator or settlor is, the creation of a remote estate, or a series of remote estates, which, if executed and complete, would be wholly void, or void as to all but the interest first taking effect, it may be laid down, that the mere circumstance, of the directions being in their nature executory, will not protect them from the operation of the Rule against Perpetuities, and that they will be in the same predicament with express estates, or, (to observe technical phraseology) trusts executed, so limited.

The records of judicial decisions do not, to the writer's knowledge, present any such case; and it is not, therefore,

possible, to define any specific line of demarcation, between trusts, which a Court of equity would deem to be within the scope of its reforming or pruning process, and such as might be considered, so radically tainted by remoteness, as to be beyond the reach of cure. Perhaps, however, a general notion may be entertained, to the effect, that the disposition of a Court of equity, in the case of Trusts Executory, is, to give effect to them, if any reasonable mode of carrying them out, compatible with the apparent design of their author, can be acted upon; and, in the words of Sir *Anthony Hart*, in the case of *Woolmore v. Burrows*, it will be no objection to any such mode, that its accordance with the settlor's or testator's meaning is conjectural, if it approaches more nearly to a rational construction of such intention, than any other which could be imputed.

It is to be observed, with reference to the practice of Courts of equity, in carrying out Executory settlements, that, unless the limitations in question be, either, in their form, or, according to the apparent intention of their author, executory, the jurisdiction of equity will not be attracted, by the mere insertion in the gift, of the phrase, "so far as the rules of law and equity will permit," or the like; (t) for, although those words show an intention, not to contravene legal limits, yet, if the limitation be complete in itself, it must be, either, wholly good, or, wholly void, as it originally stands.

Whenever the Executory Trusts to be carried out are limited by *deed*, the lives, which are to be taken as the basis of the period of strict settlement, must be those of persons living at the date of the deed creating the trusts, and not, of persons *in esse* at the execution of the settlement, by which those trusts are carried into effect. (tt) The property is, in fact, tied up from the date of the imperfect in-

Words, "as far as rules of law and equity will permit," not sufficient to render a trust executory.

Where Trusts Executory created by deed, lives must be those of persons living at its date.

(t) See *Kampf v. Jones*, 2 Keen, 756.

(tt) See *Bankes v. baroness Le Despencer*, stated 7 Jur. 210.

Trusts for purchasing property, to be settled to uses of existing settlement, person then in possession being restricted to a life-interest, with remainders.

strument ; and the settlement, which is founded upon it, must have reference to circumstances, as they exist at that time.

It next occurs, to notice a species of limitations, which, as being of an executory character, claim attention in this place, but which differ from the class of trusts we have been considering, in that, their validity has been construed to depend on the *course of events subsequent to their creation*.

The kind of trust alluded to occurs, where lands are limited, for life, with remainders, in strict settlement, and a term or trust is created for raising money, which is to be applied in the purchase of real estates ; such estates, when purchased, to be conveyed to the use of *the person for the time being in possession of the settled estates, for life*, with the usual remainders, in strict settlement. Here, it is obvious, that, if at the time of the purchase and settlement of the new estates, the person, in possession of the first settled property, should be one not born at the time of the creation of the trust, the laws of perpetuity would be violated, by a conveyance to such person, for life, with remainder, to his issue, as purchasers ; upon the same principle, as that which applies to appointments in pursuance of particular Powers : but, if the tenant then in possession of the lands originally settled was *in esse* at the date of the settlement, then, upon the like principle, there is no objection to a conveyance of the newly-purchased property, to him, for life, with remainders, in strict settlement, to his issue. The trust is, in fact, regarded, as similar to a power. The power is not void, because it embraces objects not necessarily restricted to the perpetuity-boundary ; a precaution, which, it is left to the discretion of the donee of the power, to provide, by a due observance of the prescribed limits in his appointment : and so, the trust for settlement of future property is not necessarily confined to an execution, in conformity to the laws of remoteness ; but, unless the course of events admits of such an execution, the whole trust will fail.

The case (u) which has given rise to this rule is as follows:—A testator by will devised estates in A., subject to certain terms, to the use of his son, St. B. S., for life, with remainders, subject to a limitation to trustees, to preserve contingent remainders, to the first and other sons of St. B. S., in tail-male, with remainders, to the eldest and other daughters of St. B. S., in tail-general, with remainders-over. The testator then devised certain other estates, in D. and B., to uses, in favor of St. B. S., and his issue male, and any other issue male of the testator, and subject thereto, as to a portion of such estates, the testator directed, that his trustees should hold the same for a term of sixty years, and during the said term, should receive the rents and profits thereof, and should grant leases for lives, until they should have thereby received the sum of 17,500*l.*; and the testator declared, that the trustees should apply the sum to be raised by them, as follows:—When they should have received 2500*l.*, to lay out the same, together with such interest as they should have made therefrom, or from any part thereof, in some real estate, in some or other of the parishes aforesaid, and, at the same time, to settle the same estate so purchased, *upon such persons, for life, as by virtue of his said will should then be in possession of his estates at A., or, if, in case of suffering a common recovery, or otherwise, his said estates at A. should be in other hands, then, on such person as would (in case no such common recovery had been suffered, for the disinheritance of such person,) have been in possession of the same, by virtue and according to the intent of his will, and so, from time to time, as soon and as often as the further sum of 2500*l.* should be raised, as thereinbefore directed, (until the whole sum of 17,500*l.* should be so raised) should lay out the same, together with its several interests, as therein mentioned, in some or one of the parishes aforesaid, to be settled on the*

Case of
Tregonwell v.
Sydenham.

(u) Lord *Tregonwell v. Sydenham*, 235, n.; Hargr. Accum. 95.
3 Dow, 194. And see 1 Jarm. Wills,

several persons, for life, as should be (or would have been, in case no such common recovery, on each of the said times,) in possession of his said estates, in pursuance of his said will, with such remainders, that, on each of the said several settlements, the said estates to be settled, be so settled, in pursuance of that of his will, as might continue the said estates, so long as it should please God, in the blood and name of the St. B.'s. Then followed a further trust, for raising another sum, to be invested, in like manner, in the purchase of real estates, to be settled to similar uses. Subject to the term, the estates were limited to uses, in strict settlement. The testator's only son, St. B. S., having died without issue male, but leaving issue of a deceased daughter, a question arose, between the parties entitled to the estates in which the term was created, and the heir-at-law, as to the validity of the trusts of the term, and of the directions relating to the settlement of the estates to be purchased with the monies raised under it; the former contending, that the trusts of the term were void, as tending to a perpetuity, and that it must sink into the inheritance; the latter insisting, that the trusts of the term were good, so far as concerned the raising the sums mentioned in the will, but bad, so far as the testator had directed the settlement of the estates to be purchased with those sums, inasmuch as the limitations to be inserted in such settlement tended to a perpetuity. It must be observed, that the person, entitled in possession to the estates at A., at the time limited for the commencement of the term, (*i. e.*, the death of St. B. S., without issue male,) was a child of a deceased daughter of St. B. S.; who was a person unborn at the death of the testator, and was, therefore, incapable of taking a life-estate in the purchased property, with remainders, to her issue. It was adjudged, by the House of Lords, (reversing a decree of the Court of Exchequer,) that the trusts, declared of the real estates directed to be purchased with the sums to be raised under the term, were too remote, and

void; and that the benefit of those trusts resulted to the heir-at-law of the testator, as undisposed of by the will. (v) But the expressions of Lords *Redesdale* and *Eldon*, in delivering their opinions on the case, plainly show, that the decision did not rest on the ground of "the limitations of the lands to be purchased being void in all events," but, simply, that "the conveyances of the lands to be purchased, were, in certain events, (which had happened) what the law would not permit to take effect:" those expressions, in fact, implied, that, if the person, entitled in possession to the estates originally settled, at the time of raising the money, had happened to be a person *in esse* at the testator's death, the trusts, for laying out the money, would have been legal. (w)

And, in conformity with the doctrine, thus constructively established by this case, it should seem, that every kind of trust for the settlement of future property, to be realized out of the produce of property presently settled, which does not in itself define the persons to take, and the interests to be created, but refers to the pre-existing settlement as its *basis*, will be good, or not, in event, according as the referential limitations shall or shall not prove to be such, as might have been inserted in the instrument creating the trust. Where the limitations in the new settlement are to be a mere *counter-part* or *transcript* of those in the original one, of course, the validity or invalidity of these will determine the validity

(v) In reference to the decision as to this point, Sir *Edward Sugden* (*in arguendo*, *Bengough v. Edridge*, 1 Sim. 226, 227,) has made the following pertinent observations:—"It does not appear to have occurred, to the learned persons who decided that case, that the consequence of illegality, on account of perpetuity, is different, in almost every respect, from that of other invalid dispositions. If an estate for life is given, with remainder-over, and the person, to whom

the life-estate is given, is incapable of taking it, the remainder is instantly accelerated. But if the particular-estate is void, on account of perpetuity, there is no acceleration; and even that which otherwise would be a good remainder, altogether ceases, and is void. It would, therefore, seem, that there was great occasion to suppose, that the decision of the Court of Exchequer was right."

(w) See 1 Jarm. Wills, 235, n.

or invalidity of the former; that is, the two propositions will be convertible.

A branch of the decision in *Mogg v. Mogg* considered, in reference to subject of this chapter.

It remains, to observe, that the doctrine of Executory Trusts does not present the only instances of the strict operation and effect of limitations undergoing a constructive change, in order to preclude any objection of remoteness that might attach to them in their proper character.

Thus, in a well-known case, (x) property was devised to trustees, in trust, to pay the rents and profits towards the support and maintenance of the child and children of S. M., (a person *in esse*) during his her and their life and lives, and after the decease of such children, the testator devised the estate, to the lawful issue of such child and children of S. M., and their heirs, as tenants in common. S. M. had nine children, four born in the testator's lifetime, and five after his decease. It was held, in the first place, that the trustees took the legal estate, for the lives of the children and the life of the survivor, and that, therefore, the limitations to the children and their issue could not coalesce, so as to give the children estates-tail. It was, however, also, decided, that *all the nine children* took equitable interests for their lives, and the life of the survivor of them, and that, on the decease of the survivor of the children, the property would go over to the issue of the four children of S. M. born in the testator's lifetime, by purchase, as tenants in common in fee; thereby giving effect to the ulterior limitation, which, as a remainder to the issue of children born and unborn, would have been, clearly, too remote. The Court, in fact, read the gift, as one, simply, to the issue of such of the children as should be born in the lifetime of the testator, and as could, therefore, take life-interests, with remainders to their issue. The case, consequently, forms no authority in opposition to the doctrine, formerly stated, that, where property is limited to a class of persons, the limitation must be good

(x) *Mogg v. Mogg*, 1 Mer. 654.

or bad, as a whole, and cannot be substantiated, as to a portion of the objects, and rejected, as to the rest. It must, nevertheless, be admitted, that this decision is an extreme one, and that the greatest caution is requisite in its practical application.

In confirmation of this latter view, the writer earnestly invites attention to the following just observations of Mr. *Jarman* :—"As it is clear," says that learned author, (y) "beyond dispute, that, upon the ordinary rules of construction, the devise to the issue would have included, not only those living at the death of the testator, but, also, those *who should be born during the continuance of the particular-estate*, the departure from this construction, by narrowing the range of objects, in order to bring the devise within the legal limits, goes to establish a principle of very great importance, and entitles this branch of the case of *Mogg v. Mogg*, to particular attention. It certainly *deals more liberally with the testator's disposition than some judges have conceived themselves at liberty to do*, and we are, therefore, the more surprised, that the point should have passed *sub silentio*, in the argument of the case at the Rolls, prior to the confirmation of the certificate, *notwithstanding the novelty and boldness of the construction, and the ample and able discussion given to the other parts of the case.*"

(y) 1 Jarm. Pow. Dev. 414, n.

CHAPTER XXVIII

OF THE RULE AGAINST PERPETUITIES, AS IT AFFECTS TRUSTS
FOR ACCUMULATION OF INCOME.

WITH the general subject of the accumulation of annual income, it has before been remarked, this Treatise has no immediate connexion. But there are certain Trusts of accumulation, within the operation of the Rule against Perpetuities, which, it would not be consistent with the desired completeness of our disquisitions, to leave entirely unnoticed.

Limits to accumulation and vesting of future estates, formerly the same.

It must be observed, then, that the limits to the *accumulation* of annual income, and the creation of *future estates and interests* in property, were, until the commencement of the present century, the same: that which was too remote a period, for the suspension of the acquisition of full power over the *corpus* of property, was, likewise, too remote, for the accumulation (and consequent deprivation of the beneficial enjoyment) of the accruing profits.^(z) And the results of remoteness attaching to a trust or direction for accumulation were, also, the same with those ensuing from the remoteness of Executory limitations: the trust or direction was wholly avoided; and it could not be substantiated, in part, and be deemed bad, only for the excess.

Allowed period of accumulation now

By the 39 & 40 Geo. 3, c. 98, however, the legal period for trusts of accumulation was restricted to narrower limits; and a

(z) See 1 Jarm. Wills, 264; 2 Prest. Abst. 175, 178; Hargr. Accum. 20, 61.

discretion allowed, of selecting from among various terms or computations of time specified in the act, but none of which equalled the prescribed limits of perpetuity. The act, however, was not extended to provisions for payment of debts, nor to provisions for raising portions for the children of a settlor or deviser, or of any person taking an interest under the settlement or will creating the trust of accumulation, nor to directions touching the produce of timber or wood upon lands.

Upon this act, it was afterwards adjudged, that trusts for accumulation, transgressing the limits prescribed by the act, were not wholly void, but were good for the allowed period; (a) a rule of construction entirely novel in the decision of questions, as to the remoteness of provisions suspending the present enjoyment of property.

Trusts of accumulation good *pro tanto* under this act, if within perpetuity-boundary.

The act, however, being one of a *restraining* force, it was evident, that it could not affect, or give any increased efficiency to, trusts of accumulation, expressly or possibly, *extending over a longer period than that allowed by law for the limitation of future estates.* (b) The act could only apply to provisions for accumulation, *valid independently of it*: which was not the case with respect to trusts, exceeding or not confined to the period of remoteness prescribed by the perpetuity-rule. As to such trusts, therefore, as, also, with respect to the particular provisions for accumulation specially exempted from the operation of the act, the Rule against Perpetuities is still applicable. (c) Consequently, strange as it may seem, a trust of accumulation may verge on the very outside of the allowed limits of perpetuity, and, yet, be void only for the actual excess beyond the absolute period authorized by the act; while, if it, in any degree, however insignificant, transgress the boundary of remoteness, or, if it be so framed, as that it may possibly transgress

But if directions for accumulation extend to period beyond limits of perpetuity, they are wholly void.

(a) 1 Jarm. Wills, 269. 2 Prest. Abst. 183.

(c) 2 Prest. Abst. 183. 1 Jarm. Pow. Dev. 417. Hargr. Accum. 91, 110.

(b) See Hargr. Accum. 91.

such boundary, it will wholly fail, without regard to the actual course of events.

Case of lord
Southampton v.
marquis of
Hertford.

Thus, in the well-known case of lord *Southampton v. marquis of Hertford*, (d) estates were conveyed to trustees, in strict settlement, subject to a term, which was declared to be limited upon trust, that, *during the minority of any person, who for the time being should, by virtue of the limitations in the settlement, be immediate tenant for life, in tail-male, or in tail, in possession, of, or actually entitled to, the rents of the settled estates, the trustees should receive the rents, and invest the same, so that the interest and dividends might accumulate during such minority or minorities; and that the trustees might stand possessed of the accumulations, in trust for the person or persons, who, upon the expiration of the minority, or respective minorities, or the death or deaths of the minor or minors, should be entitled to the rents, and be of the age of twenty-one years.* Here, it will be perceived, there might have been several consecutive minorities of persons succeeding to an estate-tail, during which, the trust of accumulation in question would operate, but which, nevertheless, might run through a period far exceeding the allowed limits of perpetuity. It was, therefore, held, that the provision for accumulation was void; it not being open to the Court, to model the trust, and make it good in the extent to which it might have been well carried on in its creation.

Case of
Marshall v.
Holloway.

So, also, in the case of *Marshall v. Holloway*, (e) a testator devised and bequeathed all his real and personal estates, to trustees, upon trust, to convert his personal estate into money, and, after payment of his debts and legacies, *to accumulate the surplus monies arising from the testator's personal estate, as and when and during all such times, as any person or persons beneficially interested in any real and personal estate, under the trusts thereafter declared thereof,*

(d) 2 V. & B. 54.

(e) 2 Swanst. 432.

should be under the age of twenty-one years, adding all such investments to the testator's personal estate, in order to accumulate the same; and then followed, dispositions of the testator's real and personal estates, in favor of several persons, and their respective issue, successively. Lord *Eldon* held, that the trust for accumulation was bad, because it might last for ages, and that the gift of the property took effect exempt from the trust.

In *Palmer v. Holford*, (f) stock was bequeathed to trustees, upon trust, *to raise an accumulated fund*, and to assign and transfer such accumulated fund, unto the children of the testator's son, C. J. H., who should be living *at the end of twenty-eight years*, to be computed from the testator's decease, other than an eldest or only son. It was held, by Sir *J. Leach*, that the trust for accumulation was altogether void, and that the limitation of the stock and accumulated fund also failed, as the objects would not necessarily be such as were capable within the Rule against Perpetuities.

Case of *Palmer*
v. *Holford*.

In *Vawdry v. Geddes*, (g) also, a testatrix bequeathed the produce of her residuary estate, in trust for her four sisters, for their lives, and directed, that, on their decease, the interest of their respective shares should, at the discretion of the executors, be applied in the maintenance, or *accumulate for the benefit*, of the children of each of the sisters so dying, *until they should severally attain the age of twenty-two years*; and upon the said children attaining their respective ages of twenty-two years, they to be entitled to their mother's share of the principal; with limitations-over, in the event of their deaths under twenty-two. Sir *J. Leach*, M. R., held, that the vesting of the children's interests was postponed to their age of twenty-two, and that the bequest extended to all the children, born before or after the death of the testatrix; and, consequently, that the trust for the children was too remote and void, and, with it, also, the direction for accumulation.

Case of
Vawdry v.
Geddes.

(f) 4 Russ. 403.

(g) 1 Russ. & My. 203.

Case of *Curtis*
v. *Lukin*.

And, again, the same rule was acted on in the case of *Curtis v. Lukin*, (*h*) where a testator bequeathed leasehold property, to trustees, upon trust, to invest, and *accumulate the rents, until the leases of certain other property bequeathed by the will*, and the terms wherein had upwards of sixty years to run, *had nearly expired*; and, then, upon trust, to apply a competent part of such accumulations, in the renewal of the leases secondly mentioned, for the benefit of the persons to whom the testator had given the same. Here, the trust of accumulation was to endure for a period, not, of a certainty, confined to the legal limits of perpetuity, and was, therefore, wholly void: and, accordingly, a bill, praying, that the trustees should be declared responsible for the fund which might have been realized by the accumulation of the rents, and an appropriation of such fund, towards the renewal of the leases intended to be benefited by it, was dismissed, with costs.

Case of
Griffith v.
Blunt.

And, once more, in the late case of *Griffith v. Blunt*, (*i*) there was a bequest to trustees, in trust, to *accumulate the income*, for all and every the children and child of T. R. D. and C. J. D., equally, the share or shares of such of them as should be a son or sons, to be an interest or interests vested in him or them at his or their age or respective ages of *twenty-five* years, and the share or shares of such of them as should be a daughter or daughters, to be an interest or interests vested in her or them at her or their age or respective ages of *twenty-five* years, or day or respective days of marriage; and it was held, that the gift (including, therefore, the trust for accumulation, of which, indeed, the gift alone consisted,) was altogether void, as too remote.

Effect of
remoteness in
trust of
accumulation
upon limita-
tions of

The *effect* of remoteness in a trust of accumulation, upon the limitations of the property, the income of which is to be accumulated, depends upon the general character of the dispositions, as, either, *mada subject to a void direction for ac-*

(A) Reported in 6 Jur. 721.

(i) 4 Beav. 252.

cumulation substantively and independently engrafted upon them, or, as limited to take effect *after* the termination of the prescribed period of accumulation, and *out of* the accumulated fund, as part of the subject-matter of the gift: but, into these points, it is not in order, here to enter, as they will more properly occur for consideration, when the general subject, of the consequences of limitations being void for remoteness, is discoursed upon. (*k*)

(*k*) *Vide infra*, ch. 31.

CHAPTER XXIX.

OF THE RULE AGAINST PERPETUITIES, AS IT AFFECTS THE
GRANT AND RESERVATION OF RENTS, CONDITIONS, RIGHTS
OF ENTRY, INTERESSE TERMINI, EASEMENTS, AND OTHER
COMMON LAW INTERESTS.

The doubt as
to the applica-
bility of the
laws against
remoteness to
Common law
interests.

It may seem matter for surprise, that, at this advanced period of our jurisprudence, there should exist rights in property of any magnitude or importance, with reference to which, the operation of the laws against remoteness is involved in uncertainty, and even their applicability considered debateable. Such, however, is the case: and the fact is not the less remarkable, from the circumstance, that the origin of the rights in question is coeval with the earliest periods of our legal history, and that they were known to those who laid the very foundations of our jurisprudential system.

The estates and interests alluded to are those which were, peculiarly, the creatures of the Common law, and still remain subjects of which its Courts take principal cognizance; such, for instance, as rents, rights of entry, conditions, the *interesse termini*, rights of way, water, and light, and the like. These all were rights in property, sanctioned and protected long previously to the invention of those modifications of ownership and modes of settlement, with which the greater portion of this Treatise has been so familiar.

And, as it is clear, that the doctrines of law, limiting the extent of Perpetuities, in the first place arose with reference to the estates and ~~interests~~ constructed under the operation

of the Statutes of Uses and Wills, and that, to that circumstance, it is owing, that the law of Perpetuity has been so little discussed in respect to estates and interests arising by other means, (*l*) so, it is certain, that many of the objects and provisions, formerly effected by the creation and limitation of the Common law rights above-mentioned, are now frequently carried out by means of the modern schemes of disposition, which are recommended by their superior aptitude and facility of adaptation.

But, still, the question, as to the applicability of the laws against remoteness to rights and interests at Common law, is of more than speculative importance; and it becomes necessary, to determine this point upon settled principles of law, with the aid of whatever of authority our judicial records and authoritative legal commentaries may afford.

In the first place, then, it may be observed, that, strictly speaking, some of these rights may themselves be considered as burthens impeding the free circulation of landed property, and as, therefore, in their own nature, (without reference to the mode and circumstances of their limitation,) exposed to objection. (*m*) Such, for example, are rights of way, light, and water, and, even, rents. But, this is a view, at the least, extravagant, and, certainly, incapable of being practically supported; for these rights are recognised by law, as a substantive species of property, differing only from land, in that it is incorporeal, but, with land, capable of being made the subject of sale, transfer, settlement, and all other legal modes of disposition, and embraced, too, as an independent object of all the laws which have been established to regulate rights in property. *From the very nature of the case*, the corporeal property in question is *clogged*, when subjected to these rights, and its value may, therefore, be proportionably decreased, but its alienability is unaffected, and its aptness for commercial dealing remains.

Some of these interests in their own nature obstructive of free circulation of property: but legally sanctioned and unobjectionable.

(*l*) 3 Re. Pr. Com. Rep. 31.

(*m*) See 3 Re. Pr. Com. Rep. 51.

Rents, &c.,
may be limited
to commence
in futuro.

The first thing to be observed, in reference to the question of the possible remoteness of the Common law rights under consideration, is, that, when granted *de novo*, they may be limited to commence *in futuro*.⁽ⁿ⁾ The grounds of the Common law prohibition, against limiting an estate of freehold to commence *in futuro*, have no applicability whatever to rents and other like interests. Thus, it has been well said:^(o)—"If an original grant be made of a rent, to commence after the death of J. S., it is good: for this is not like the case of lands, where the livery must carry the freehold immediately, and where the abeyance, for want of distinguishing where the freehold is, may be of prejudice to the rights of others; for if the freehold was to be granted *in futuro*, and a man had brought his *præcipe* against the grantor, after he had proceeded in it a considerable time, the writ might *abate* by the freehold's vesting in a stranger, by reason of a conveyance made by the grantor, before the writ brought. But the grant of a rent *de novo* is not attended with the like inconveniency; for no man can have a precedent right to a thing which is originally created by the grant itself."

This rule is equally applicable to limitations of the *interesse termini*, and to grants and reservations of conditions, easements, and other incorporeal hereditaments.^(p)

The validity, then, of rents, and other similar interests, limited to commence *in futuro*, being established, it is obvious, that they must have a tendency to remoteness, unless there are rules of the Common law applicable to them, which preclude their taking effect in contravention of the limits of perpetuity; unless, in fact, it can be said, to be impossible to put a case of a Common law conveyance or grant, calculated to operate as a fraud on the Rule against Perpetuities, which would not be met *in limine*, and ren-

(n) 1 Prest. Estates, 218, 247,
250. 3 Prest. Abst. 48. F. C. R. 529.

(o) Gilb. Rents, 59.

(p) 2 Prest. Abst. 146; 3 ib. 48.

dered void, by one or other of the rules of the ancient Common law.

One of these rules which might, probably, be deemed a preservative against undue remoteness in rents and other like interests, was that which disallowed limitations of future estates upon double possibilities, or, as it was technically termed, on a possibility upon a possibility. Thus, it was said:—(q) “If a man gives lands, to two men and one woman, and the heirs of their three bodies begotten, in this case, they have several inheritances; for, albeit it may be said, that the woman may, by possibility, marry both the men, one after another; yet, first, she cannot marry them both *in præsentia*, and the law will never intend a possibility upon a possibility, as, first to marry the one, and, then, to marry the other.” And, so again, it was laid down, (r) that, “if a lease be made, for life, the remainder, to the right heirs of J. S., this is good, for, by common possibility, J. S. may die during the life of the tenant for life, but, if, at the time of the limitation, there be no such person as J. S., but notwithstanding, during the life of the tenant for life, J. S. is born and dieth, his heirs shall never take.” And in reference to this last case, Mr. *Fearne* observes: (s)—“The possibility, on which the limitation is to take effect, is too remote, for it amounts to the concurrence of two several contingencies, not independent and collateral, but the one requiring the previous existence of the other, and yet, not necessarily arising out of it, *viz.*, first, that such a person as J. S. should be born, which is very uncertain, and, secondly, that he should die during the particular-estate, which is another uncertainty engrafted upon the former.” And the same doctrine, as to the invalidity of future estates depending on a double possibility, has been, also, advanced, or referred to as operative, by other writers. (t)

Of the Common law rule against a possibility upon a possibility.

(q) Co. Litt. 184 a. And see ib. 31 b.
25 b.

(s) C. R. 251.

(r) 2 Rep. 51 b. And see 10 Rep.

(t) 2 Bl. Com. 169, 170. 1 Sug.

Nature of this doctrine, and its present weight.

This doctrine had reference, chiefly, to remainders, but was, doubtless, equally applicable to rents and other incorporeal rights, commencing *in futuro*. It, clearly, had no connexion with the modern law of perpetuity, since, in all the cases by which lord *Coke* illustrates its operation, in reference to remainders, the event or possibility, whether common or double, must have happened previous to the determination of the particular-estate, (in those times always limited to a person *in esse*,) or the remainder could not have taken effect. But, it is plain, that this doctrine never could wholly preclude questions as to remoteness, seeing that many cases might be put, of limitations, void under the law of perpetuity, which would, nevertheless, be free from the objection of depending upon a double possibility. *E. G.*, a grant of a rent, at the expiration of forty years, to A., and his heirs, would, clearly, be good, so far as respects the doctrine in question, while there can be as little doubt, that, (unless antecedently found void upon other grounds,) it contravenes the modern Rule against Perpetuities.

Independently of these considerations, it is to be noted, that lord *Nottingham* observed, (*u*) that there might be a possibility upon a possibility, and a contingency upon a contingency, was neither unnatural nor absurd in itself, and that he had known that rule often denied in Westminster Hall. And, so, Mr. *Butler* remarked, (*v*) the expression of a possibility upon a possibility must not be understood in too large a sense, for that a remainder, to the son of A. who first or alone shall attain twenty-one, was so far a possibility on a possibility, as it depended for its effect on the happening of two possible events; that A. should have an eldest or only son, and that such son should attain twenty-one; but that the validity of such a remainder was, nevertheless, unquestionable. And, again, the *Real Property Commis-*

Pow. 493, 494. Rand. Perp. 102.

Cru. Dig. Tit. xvi., c. 2, ss. 4, 8.

2 Harg. Jurid. Arg. 45.

(*u*) See 3 Re. Pr. Com. Rep. 29.

(*v*) Note to F. C. R. 251.

sioners, (vv) after quoting the sentiment of lord *Nottingham*, to the effect above-mentioned, observed, that modern determinations had established his lordship's opinion. Mr. *Preston*, again, (w) has ably shown, that the cases, by which lord *Coke* illustrates the doctrine under consideration, may be easily accounted for, on principles of law, without resorting to the quaint and unintelligible terms of a possibility on a possibility; and that they must be understood as confined to instances, in which the future estate is void, either, from the uncertainty of the person who is take, or, from the gift being to persons particularly designated, while, in point of fact, there is not any individual answering that description.

This doctrine, then, while it embraced many limitations of future estates that would have been equally void under the modern perpetuity-rule, and also some that would have been *not* so, yet failed to meet others, which are clearly condemned by the latter, and, therefore, afforded no guarantee against undue remoteness in Common law estates. At the same time, however, its effect, unquestionably, was, to deter donors and settlers from the grant and reservation of future rights, of a remote character, on account of the indefinite nature and oblique operation of the doctrine, and the consequent uncertainty, as to how far the dispositions in question might be affected by it.

A more important argument which may, perhaps, be urged against the applicability of the laws of remoteness to grants of rents and other Common law interests, is, that there are grounds for supposing, they cannot be limited or reserved to *persons unborn*. This, clearly, would go far towards determining all controversy on the subject, supposing the authorities, capable of being adduced in its support, will bear the construction, necessary to be put upon them in order to establish the doctrine in question. This, however, it is confidently presumed, will be found, upon examination, not to be the case.

Whether the Common law permitted the grant of rents, &c., to persons unborn.

(vv) 3 Rep. 29.

(w) 1 Essay on Abet. 128, 129.

It is laid down by *Littleton*, (x)—“No rent (which is properly said a rent) may be reserved upon a feoffment, gift, or lease, but only to the feoffor, or to the donor, or to the lessor, or to their heirs, and in no manner, it may be reserved to any strange person. But if two joint-tenants make a lease, by deed indented, reserving to one of them, a certain yearly rent, this is good enough to him to whom the rent is reserved, for that he is privy to the lease, and not a stranger to the lease,” &c. And, again,—“No entry nor re-entry may be reserved or given to any person, but only to the feoffor, or to the donor, or to the lessor, or to their heirs: and such re-entry cannot be given to any other person.”

From these passages, it may, possibly, be inferred, that rents cannot be reserved, except to a person *in esse* at the time of the reservation: and it may, perhaps, further, be said, that *grants* of rents *de novo* are bound by the same rules. Both these inferences, however, seem open to just exception.

In the first place, what is the case to which *Littleton's* rules have reference? Let Lord Chief Baron *Gilbert* supply the answer. After quoting the first of the above extracts from *Littleton*, that learned writer says: (y)—“And the reason of the rule is this; *because the rent is something paid by way of retribution for the land; and, therefore, ought to be made to him from whom the land passes.*” And, so, Mr. *Butler*, in his note to the passage in *Littleton*, remarks, in nearly the same terms, (z)—“The principle which gave rise to this rule, is, that rent is considered as a retribution for the land, and is, therefore, payable to those who would otherwise have had the land.” The rule in question, then, clearly, has reference only to the *reservation* of rents, on feoffments and conveyances in fee, or leases for lives or years: it, in fact, lays down a principle which is of

(x) S. 346.

(z) Note to Co. Litt. 214 a.

(y) Treatise on Rents, 54.

the essence of a reservation ; and has no connexion with any question, as to the person to whom the rent is reserved being born or unborn.

And, then, as to any inference, that the rents can only be reserved to persons *in esse* : this seems to be equally untenable, both because *Littleton's* position proves too much for it, and, because this, again, affirms more than is warranted by the former.

The doctrine in *Littleton* establishes too much for this hypothesis. That doctrine declares, that the rent may, "in no manner be reserved to *any strange person*," and that "such re-entry cannot be given to *any other person* ;" whereas the inference in question admits the validity of a grant of a rent to *any person in esse* ; and, in so admitting, it is clearly right : both doctrines are good, but they have reference to wholly different cases. The premiss, then, is too strong for the conclusion ; and this, also, more extensive than the former.

Again, it may be argued, that *Littleton* disallows the grant of a rent to persons *unborn*. Let us hear, how far lord *Coke* agrees with any such interpretation of the doctrine. "Hereby," says the commentator, (a) "it may seem, that if a man make a feoffment, gift, or lease, that (omitting himself) he may reserve a rent to his heirs. But *Littleton* is not so to be understood ; his meaning is, that either the feoffor, &c., may reserve the rent to himself only, or to himself and his heirs. And yet it is holden in our books, that a man may make a feoffment in fee, reserving a rent of 40s. to the feoffor, for term of his life, and after his decease, a pound of comyn, to his heirs, that this is good." Here is a case supposed of a new and independent rent reserved to the heir, who may, of course, be a person unborn at the time of the reservation ; which is, nevertheless, declared to be valid.

But, perhaps, it may be said, *Littleton's* doctrine decides,

(a) Co. Litt. 213 b, 214 a.

that the rent will be good, *if granted to a living person and his heirs*. This, however, seems to be, again, a conclusion not warranted by the premises. The doctrine in question allows the reservation of a rent *to the feoffor, donor, or lessor, and his heirs*: it nowhere embraces any other person, nor the heirs of any other person, although such person be *in esse*. Besides, if the grant be allowed to be extended to the heirs, where will be the security supposed to be afforded by the circumstance of the immediate grantee being a person *in esse*? Will not the heir be entitled, although the ancestor die prior to the commencement of the rent? Moreover, as the event (upon the hypothesis) may be of any degree of remoteness, may not the heir who eventually becomes entitled be a person *unborn*? And, if so, is not the rent, in that case, practically granted to a person not *in esse*?

Thus, then, it seems impossible, to found upon the rule laid down by *Littleton*, any hypothesis or inference, favorable to the doctrine, that rents cannot be granted to persons unborn.

This view is strongly corroborated by an old case in *Hobart*, (b) which is thus stated:—"Between *Oates* and *Frith* the case was, that the father being seised in fee, he and his son and heir apparent, by indenture, leased land unto the defendant, for years, to begin after the death of the father, rendering rent unto the son; the father died; lessee entered; and the rent was behind; and the son distrained; and the lessee brought an action of trespass, and had judgment: for the reservation of the rent was held utterly void; although the son did prove heir, it bettered not the case by event, but the reservation must have been to the heir or heirs of the lessor, by that name, for that is the only word of privity in law, requisite in reservation of rents and conditions, for the heir is in representation, in point of taking by inheritance, *eodem personâ cum antecessore*. And

(b) 130, Trin. 12 James.

though, in such a case, the rent could never be demanded by the father, yet the heir shall take it from the father, as inherent, and rising from the root of the reversion, which was his father's, and which he takes by descent from his father; and so the rent itself, which was in the father, though not to demand, because it was not yet due, but yet it was so his, that he might release and discharge it by the word, 'rent,' though not by the word, 'action.' And so, note a difference between this case, where rent is reserved upon a lease of the ancestor's, to the heir first, and when the ancestor makes a warranty for a like charge against his heirs, first omitting himself: all such grants are utterly void, for no man can charge his heir but as a part of himself, and, therefore, beginning with himself. And such charges stand naked, and have nothing that was first in the father, and comes from him to them, whereunto they may cleave, as a rent to a reversion, in the former cases."

This case forms one of the authorities cited by lord *Coke*, in support of *Littleton's* doctrine above commented on, and seems conclusively to show, that that doctrine had reference solely to the question of the *reservation* of rents, as respects the feoffor or lessor, and his heirs, and had no connexion whatever with the general subject of independent grants of rents. (c)

Irrespectively of the authorities which have been considered, nothing is to be found in the ancient text-writers, at all countenancing the notion, that rents cannot be granted to persons unborn; and it is clear, that, if there be no objection to such limitations of *rents*, similar grants of *other* Common law interests are equally valid.

Rents, &c., might be granted at Common law to persons unborn.

But, it is worthy of observation, that, even supposing the doctrine in question were sustainable, it would by no means exclude the necessity for the application of the laws against remoteness, seeing that a rent may be created *in præsentis*,

Even if grants of rents, &c., to persons unborn, void at Common law, yet rule against

(c) The same observations apply to *tingham*, MSS. *Huntley's* case, Palm. 485; lord *Not-*

remoteness not
thereby ex-
cluded.

and in favor of a person *in esse*, but subject to divesting, suspending, and qualifying gifts and conditions, which, however remote, would not be invalidated by any rule as to limitations to persons unborn; and which, therefore, clearly call for the application of the perpetuity-rule.

That such gifts were not wholly unknown, is clear, even in the way of positive authority, as will appear from a case, in 12 Edw. 3, cited in *Plowden*, (*d*) which is thus stated:—"It is held in 12 Edw. 3, that if one grants to another, a rent out of his land, in fee, upon condition, that if the grantee or any of his heirs die, his or their heir being within age, then, during such non-age, the rent shall cease, there, if the grantee dies, his heir being within age, his wife shall have dower, but execution shall cease during the non-age of the heir, but there it is put, that if the heir dies during his non-age, his wife shall not have dower of the rent, for there the rent was never leviable in the son, as it was in the father, and the rent would have been *in esse* at the full age of the heir, if he had lived so long, and so there the rent for a time may be *in esse*, and for a time shall not be *in esse*, because it was newly granted, and at the first commencement of a grant, a man may grant the thing, in what form he pleases, as a rent *de novo* may be granted, to commence after the death of J. S., but a rent, or a reversion, or other thing *in esse*, a man cannot make it to be *in esse* at one time, and to cease at another, nor grant it to another person, after the death of any one, or at a day to come, reserving to himself an estate in the mean time."

No rule of
Common law,
rendering
unnecessary
provisions
against
remoteness.

There seems, then, to be no rule of the Common law, operating to preclude the grant and reservation of rents, and other like interests, in a manner that would bring them within the operation of the laws against remoteness; no security, in fact, in the nature of the case, and independently of extrinsic rule, that the interests created will take effect

(*d*) Pp. 155, 156. And see Fitz. Cru. Dig. tit. xxviii, ch. 2, s. 32.
Dower, pl. 143; Jenk. Cent. 1, Ca. 6;

within the prescribed limits of perpetuity, or within any other reasonable period. It, further, seems undeniable, as has been already said, that there is nothing in the character of the interests of which we are speaking, to entitle it to exemption from the rules providing for the free circulation of property. As a consequence of these views, the conclusion seems inevitable, that the creation and reservation of Common law rights of property must be subject to the observance of the beneficial restrictions ascertained and fixed by the Rule against Perpetuities.

For this conclusion, an abundance of professional opinion is to be adduced, from the works of writers on different branches of real property law.

Lord Chief Baron *Gilbert*, after stating, in the passage already quoted, that rents granted *de novo* may be limited to commence *in futuro*, thus remarks (e) :—" Yet, *quære*, at what distance of time such charges may be allowed to commence, whether it must not be after the lives of persons *in esse* ? for, if they be *indefinite*, they seem to have the same tendency to a perpetuity as any contingent remainders or Executory devises : and the bare affection of a perpetuity is sufficient to damn any conveyance."

Again, Mr. *Butler*, (f) :—" If an estate be conveyed to A., and his heirs, to the use, that B. may receive a rent, for life, and after his decease, to the use, that his first and other sons, successively, and the heirs of their respective bodies, may receive the rent ; these, it may be contended, are distinct rents ; and, therefore, *the rent to the second son may be considered too remote*, as being a new rent, limited to take effect after an indefinite failure of the issue of the first son." And the same learned writer has elsewhere (g) remarked :—" If rents are created to commence at a future time, *care must be taken, that the period at which they are created to*

(e) Treatise on Rents, 59.

s. iii, 4.

(f) Note to Co. Litt. 271 b, n. 1.

(g) Note to F. C. R. 528.

there is strong ground for contending, that, when a rent is granted *de novo*, to one, for life, and after his decease, to his sons, successively in tail, each of the persons to whom the rent is limited takes a distinct rent; in which case, obviously, the rents of the second and younger sons would be void for remoteness, as commencing after an indefinite failure of issue, and as being, at the same time, unbarrable, because not mere ulterior gifts of a rent already existing, that is, the rent limited to the first son and the heirs of his body, but wholly independent of such rent. (m)

Rents granted to secure performance of covenants not to build, &c.

A class of these rents, in respect to whose relation to the perpetuity-rule, more than ordinary doubt has existed, is that of rents, created for the purpose of securing the performance of covenants, entered into by the owners of particular land, with the proprietors of other neighbouring or adjoining land, that the former shall not be built upon or planted, or so as to impose other restrictions upon the mode of enjoyment of land, in favor of persons taking no property in such land. These covenants are of frequent occurrence, in cases where the areas of squares or public walks are to be preserved, or where an uninterrupted view of the sea, or of open country, is to be secured to the owners or occupiers of adjoining houses. (n)

That such covenants are valid, there can be little doubt, seeing that every fee-simple owner of land may alienate the dominion of the light and air above the soil, as well as of the mines and minerals beneath it. (o) But, though the covenants themselves are not open to any reasonable exception, it seems at least questionable, how rents granted for securing their observance can be valid, unless, with all other rents, their commencement be restricted to the proper period. There is nothing of the character of a *reservation* in such rents; and, though granted by way of penalty, for breach of a duty imposed on himself and his successors, by

(m) Butl. n. to F. C. R. 528. (n) See 3 Re. Pr. Com. Rep. 53, Butl. n. to Co. Litt. 271 b. n. 1, s. 54.
iii, 4. Burt. Elem. Comp. 373. (o) See Appendix, no. IV.

the proprietor of the land, they do not attach as a consequence of any legal privity or relationship, either of person or estate, between the grantor and grantee. Both covenant and rent form matter of contract; and, though the former is good as an absolute alienation of (what may be termed) the super-terrene dominion, the latter appears to require the restrictions imposed by the perpetuity-rule, as being a charge on the property in the land.

And if the grant of a rent *in futuro*, on breach of the covenant in question, whenever it occurs, be void, as not properly restricted, it should seem to be equally clear, that a limitation of a rent *in præsenti*, subject to a clause of defeazance, *suspending* the operation of the grant, until the alteration in the circumstances of the land against which the covenant is directed, would be equally objectionable, because it is not, in point of fact, certain, at the time of creating the rent, that it will attach within the period of lives in being and twenty-one years, (*p*) and it is of no importance, in reference to the question of remoteness, that the primary operation of the grant is immediate and absolute.

This difficulty has sometimes been ingeniously obviated, by the grant of an immediate rent, with an accompanying provision, that the non-building or non-planting, or other act provided to be done or observed by the covenant, shall be taken as and be deemed to be a payment of the rent, and shall entitle the grantor to a receipt, on every periodical day of payment, for the proportionate part of the rent then due. To such a plan of effecting the object in question, there seems to be no sound or substantial objection, though it is, of course, little else than an astute subterfuge, to which the inconvenience (in this respect) of the general rule of law has given rise.

2. The operation of the Rule against Perpetuities upon Limitations of
the interesse

(*p*) See Appendix, no. IV.

termini as
affected by the
perpetuity-
rule.

limitations of the *interesse termini* seems to be of much the same character with its effects in regard to grants of rents.

It is true, that, at the Common law, there does not appear to have been any rule, fixing the period within which an *interesse termini* must take effect in possession; (*q*) but that is to be ascribed to the simplicity of the modes of disposition and settlement, and the equally unsophisticated plans and designs of grantors and settlors, during the times when our laws were less refined and complex, our habits and manners ruder and less cultivated, and our society less artificially distributed, than at present.

But, to return, if the period or event, at or on which the term is to commence, be not such as will necessarily arrive or happen within the legal limits of perpetuity, and it be not expressly provided, that it shall so arrive or happen, there seems to be no alternative but the entire invalidity of the limitation. And this, whatever the object to be effected by the creation of the term; whether it be a simple lease, or a demise for securing portions, or raising money to pay debts, or forming an accumulated fund, or securing a sum of money, or a rent-charge, or for serving any other purpose which, in its own nature, or by express provision, will not give effect to the term before the expiration of the legal period. It follows, therefore, that a term limited to commence on the death of an unborn person, (not being restricted to his age of twenty-one) or on an indefinite failure of issue, or on an unborn child not taking Holy Orders, or not doing any other act the performance of which is not confined to minority, or on any other contingency which will not necessarily happen within the allowed limits, is void *ab initio*, and will not take effect in possession, although the course of subsequent events may be favorable to its so doing.

Of conditions,
with reference

3. In discussing the operation of the Rule against Perpetuities upon *conditions*, it will be necessary to observe a

(*q*) 1 Sand. Uses and Tr. 197. 1 Lev. 35.
And see Co. Litt. 456; 6 Rep. 35;

distinction between conditions *implied*, and conditions *expressed*. to rule against remoteness.

It may, however, be first remarked, that there appears to have been no limit at the Common law, as to the periods or events at or on which conditions defeating estates might be limited to arise. (r) Frequent instances are to be met with, in our ancient reports and text-books, of conditions, contemplating events which would at the present day be clearly too remote: *e. g.*, if A. or his heirs pay a sum of money to B. or his heirs; (s) if A. or his heirs execute an assurance to B. or his heirs; and such like. Conditions were, in fact, only required to be possible, not contrary to law, and not repugnant to the estate or interest granted.

In relation to *implied* conditions, it is manifest, the perpetuity-rule can have no force. Of this class of conditions, an instance is afforded, in the case of an exchange at Common law, to which a condition is impliedly annexed, that, if either of the parties to the exchange be at any time evicted from the property taken by him in exchange, owing to a failure in the title of the other party, the person so evicted and his heirs may re-enter on the estate given by him in exchange for the one of which he has been deprived. (t) And a similar implied condition is consequent on a partition between two or more coparceners. (u) These conditions are legal incidents of certain Common law assurances, and to them, therefore, no objection of remoteness can attach, although there is no other limit to their operation than that afforded by the Statutes of Limitations; which, however, have the effect of protecting the title of each party to the exchange, from disturbance by strangers, after the lapse of *forty* years. These conditions must, consequently, be excepted from the general doctrine of law, before observed

(r) 1 Sand. Uses and Tr. 198. Pr. Com. Rep. 37.
 199. 3 Re. Pr. Com. Rep. 36. (u) 2 Bl. Com. 300. 1 Prest.
 (s) Co. Litt. 214 b. Abst. 303; 2 ib. 75.
 (t) 2 Bl. Com. 300, 323. 3 Re.

upon, which precludes the implication of interests inconsistent with the Rule against Perpetuities. But, it must be noted, that if there be an express shifting use substituted for the implied condition, such use will be void, as too remote, if not restricted to arise within the legal limits of perpetuity. (v)

Express conditions.

As regards *express* conditions, however, a clear difference must be taken. These arise in the will of the settlor or testator, or form articles in contracts; and they, then, seem to fall entirely within the reason and operation of the perpetuity-rule. Of this kind, are conditions declared or reserved on conveyances in fee, entitling the grantor or his heirs to enter, on the happening of any specified event. In such cases, if the contingency contemplated be of too remote expectancy, (as either actually transgressing or not confined to proper limits) the condition must (it should seem) be null altogether. Any event, consequently, ascertained to be too remote in reference to *remainders* and *executory limitations*, will vitiate a Common law *condition* limited to arise on it.

Conditions on conveyances in fee, as to taking and using name and arms.

One of these conditions, with respect to which some doubt has been made, occurs, where property is devised or conveyed to a person, and his heirs and assigns, on condition, that he and they shall take and continue to use and bear the name and arms of the deviser, or settlor, or of any other person or family. Now, if such a condition as this were satisfied by the first donee or devisee taking the name and arms, without reference to a subsequent continuance of the user by his posterity and alienees, the condition would be unimpeachable: but it seems difficult, if not, impossible, to give so limited a construction to the condition in question. If, on the other hand, the condition have reference to each successive proprietor, it appears to be directly within the scope of the rule against remoteness,

(v) Sugd. Gilb. Uses and Tr. 179. 3 Re. Pr. Com. Rep. 37.

and, therefore, to be void, if not, as respects the immediate object of the gift; yet, certainly, as to all succeeding owners of the property. It has been observed (*w*) of these conditions, that if the grantee or devisee assume the name, he acquires the estate subject to a condition in law, that if he or his heirs discontinue to use the surname, the heir-at-law of the grantor or testator will have a right of entry upon the estate, at whatever period the non-user of the name may happen; and that, if this construction should be correct, a perpetuity would be created; but that the principle of law, prescribing the boundaries within which Springing Uses and Executory devises are to take effect, would apply to the entry of the heir in this case upon the breach of the condition, if it were admitted that such condition was not performed by taking the name. And, again, it has been remarked, (*x*) that this, if anything, is strictly a condition at the Common Law, enabling the heir-at-law, (in terms at least) at any future time, to enter, in case the grantee, his heirs or assigns, should refuse to take the name and use the arms specified, although, if there had been a devise to another, in case he should refuse or neglect to take the name, or use the arms, it would have been an Executory devise. It seems to be indisputable, then, that, upon principle, conditions of the kind last-mentioned are exposed to the objection of remoteness. Whether the consequence of this objection is, to vitiate the whole condition, or only, so far as it affects all persons succeeding subsequently to the immediate grantee, or, even, only after the expiration of twenty-one years from the decease of such grantee, it may be difficult to determine. There is, certainly, a distinction, between this class of conditions and other limitations, as respects the operation of the perpetuity-rule, in regard to the circumstance, that a condition of this kind does not resemble one entire gift or reservation, taking effect or failing

(*w*) 1 Sand. Uses and Tr. 199. (*x*) 3 Re. Pr. Com. Rep. 36.
And see *ib.* p. 205.

at a single period, but that it is continuing, and runs with or follows the line of persons succeeding to the property, and might, perhaps, therefore, not inconsistently with general analogy, be held valid and operative, as to the persons taking within the allowed limits, although nugatory as to all subsequent proprietors. This point, however, it is beyond the province of the present Treatise to determine.

Conditions
determining
estates-tail.

It will be hereafter seen, (y) that conditions determining *estates-tail* are not open to any exception with respect to remoteness.

Operation of
perpetuity-
rule upon
rights of entry
and re-entry.

4. Closely allied to the last branch of the subject, is that of the operation of the Rule against Perpetuities upon *rights of entry* and *re-entry*.

The greatest portion of these interests consists of rights of entry and distress, either granted expressly, or implied in law, for securing the regular payment of rents, rents'-charge, and rents'-service; (z) and which rights are, of course, necessarily, co-extensive with the rents, and must follow them. (a) And, it is to be observed, that a right of entry, when exercised, passes "a *quasi* conditional inheritance, (b)" and that "the grantee has an interest vested in him when the rent is in arrear," (c) and that the right "may be transferred with the rent because it is a matter of inheritance, and waits upon the rent, and is not a mere possibility or contingent estate, not coupled with any other estate." (d) A right of entry is, consequently, to be treated as part of the estate of the grantee in the rent, and not as creating uncertain and independent interests in the property charged with it, which may arise at any period of time, and which are, therefore, within the operation of the perpetuity-rule: it constitutes, in fact, an unascertained modification of ownership in the land, which attends the property in the rent, and merely

(y) *Vide infra*, ch. 32.

179, n.

(z) Sugd. Gilb. Uses and Tr. 179,

(c) Gilb. Rents, 139.

n. Gilb. Rents, 38. 2 Bl. Com. 42.

(d) Sugd. Gilb. Uses and Tr.

(a) 3 Re. Pr. Com. Rep. 37.

179, n.

(b) Sugd. Gilb. Uses and Tr.

presents different and more available means for realizing the latter as a charge upon the land. Nor is the case materially varied, by the circumstance of the right of entry extending to lands not charged with the rent; (e) as when a power of distress and entry is granted in one estate, as an indemnity against a rent charged upon another.

This view of rights of entry granted for securing rents shows very plainly, that no substantial objection can attach to them, in point of remoteness, although, in the case of perpetual rents, advantage may be taken of them at any period of time. And this conclusion is further established, by the fact, that, in the case of *rents'-service*, the law *implies* a right of entry, or, at least, distress, without any express grant or reservation of it in the instrument creating the rent.

It is unnecessary to speak of rights of re-entry for conditions broken, as the latter have already been considered, and it is clear, that the character of the right of re-entry must always be the same with that of the condition on breach of which it arises: if the condition be entirely void, so also must be the right of re-entry; if it be only partially so, the like may be predicated of the accessory right.

With respect to rights of entry reserved upon leases for lives or years, the spirit of the remarks before offered in reference to rents payable under such leases, is equally applicable. Such a right, in fact, merely confers a power to put an end to the contract, on non-performance by the lessee of the conditions, on faith of which it was entered into.

5. The only class of Common Law interests, of which mention remains to be made, is that consisting of rights of way, water, and light, and other *easements*. Easements seem to be in the same predicament with rents, in respect to the validity of grants of them *in futuro*. Unless restricted, in their commencement or first taking effect, to the limits of perpetuity, they appear to be open to the same objection

Grants of
easements with
reference to
Rule against
Perpetuities.

(e) See Gilb. Rents, 41.

(though, perhaps, in an inferior degree) with remote executory estates in land; and there can be little doubt, that, when occasion arises for the consideration of the question, the applicability of the rules of remoteness to grants of easements will be judicially recognised. They operate as burthens and incumbrances on the land: the general policy of the law requires, that such burthens should arise within a reasonable period of time: and the standard for ascertaining that reasonableness is the Rule against Perpetuities.

Besides easements, there are commons of pasture, piscary, turbary, and estovers, and other rights to profits *à prendre*, which, though usually claimed by custom or prescription, may yet arise by grant; and when any such interests are so created *de novo*, the time of their commencement must not (it should seem) exceed the legal limits of remoteness.

Provisions for
cesser of rents,
&c., must
conform to
limits of
perpetuity.

Here, it must be observed, that, in the case of rents, easements, and the *interesse termini*, it is necessary, that all provisions for the *cesser* or *extinction* of the interest granted should be restricted to the legal period of remoteness; for the Rule against Perpetuities is equally violated, whether the commencement of the rent, term, or easement, be fixed at too remote a period, or its continuance be liable to a clause of defeazance, upon the happening of a future remote event. The only distinction, between the two cases, is, that, in the former, the interest itself fails of taking effect, while, as respects the latter, that interest becomes absolute and indefeasible, by the avoidance of the remote clause of cesser.

Remark as to
the want of
authority for
these rules.

In reference to all the foregoing propositions and distinctions, it is to be remarked, that, though the absence of authority which the learned reader will have noticed, must be considered as leaving their correctness open to question, yet, that it does not form any serious obstacle to their reception; because the Rule against Perpetuities is to be treated as embodying a grand and fundamental principle of our jurisprudential code, which condemns all estates, rights, and interests, of whatever class, operating as a

clog on the free alienation and transmission of property, unless, *suis viribus*, affording a preservative against undue remoteness; and, therefore, the application of the perpetuity-rule must always be clear, without the support of express adjudication, unless, from the operation of extrinsic principles and doctrines of law, the aim of that rule be otherwise secured; which, as we have seen, cannot be predicated of the Common law rights and interests, of which we have been treating.

Before closing this branch of our subject, an observation must be made, with respect to one interest at the Common law, which cannot in any way be properly brought within the operation of the Rule against Perpetuities. The interest in question is the possibility of reverter, which, by construction of the Common law, abides in every grantor, and the representatives of every grantor, by whom property is conveyed in fee-simple to a corporation; and by virtue of which, the law declares, that, on the disruption, dissolution, or extinction of the corporate body, such grantor, or his representatives, shall be entitled to re-enter. (f) The application of the rules of remoteness to such a case, is, clearly, impossible, seeing that there is a necessity to provide for the failure of the gift or grant, in the manner referred to; and *necessitas legem non habet*.

The possibility of reverter remaining in grantor and his heirs, on grants in fee to corporations.

(f) Co. Litt. 13. 1 Bl. Com. 484; 2 ib. 256, 257.

CHAPTER XXX.

OF OTHER LIMITATIONS AFFECTED BY THE RULE AGAINST PERPETUITIES.

IN the present Chapter, it is proposed to consider the laws against remoteness, as they affect,

1st, Limitations after or subject to a trust or direction for payment of debts;

2dly, Limitations after or subject to a trust for accumulation of income, for the renewal of unexpired leases;

And, 3dly, Limitations of personal chattels to go or descend as heir-looms, with real estate entailed in strict settlement.

SECTION I.

Limitations after or subject to a trust or direction for payment of debts.

When chattel interests only created for raising fund to pay debts, objection of remoteness cannot apply.

To arrive at a clear conception, as to the extent of the connexion of these limitations with the Rule against Perpetuities, it must be remembered, that provisions for payment of debts may assume the form, either, of a chattel interest co-extensive with the object to be effected, or, of a fee-simple to be held and disposed of for the purpose of raising the necessary funds. In the former case, all limitations subsequent to the provision for debts take effect as remainders or executory limitations, expectant upon the

determination of the chattel interest, and are not, therefore, (however objectionable on *other* grounds) within the scope of our *present* inquiries as to the operation of the perpetuity-rule.

Where, however, the disposition to the trustees, absorbs the whole fee, by reason of its being made to them and their heirs, or of there being an express or implied direction for sale, the limitations after or subject to the trust for payment of debts cannot take effect by way of remainder, but must operate, if at all, either, as Executory devises or Shifting Uses, or, as Trusts in equity. The question which now offers itself for consideration, therefore, is, whether the indefinite and unrestricted event of the general satisfaction of a person's debts be such as allows of an Executory devise or Shifting Use being limited upon it, within the provisions of the Rule against Perpetuities. (*g*)

Question is, whether limitations after trusts for payment of debts, embracing fee, pass valid legal executory estates.

Considering the question upon strict principles of law, there is no difficulty in coming to the immediate conclusion, that limitations dependent upon the event alluded to are, as respects their conferring legal estates, wholly void for remoteness. Were there any guarantee, in the nature of the case, for the happening of the contingency within the period of twenty-one years, (for, the trust not being supposed to be restricted to any life or lives, or to any particular period, no other term is admissible; and it may, perhaps, be questionable, whether even the term of years can be taken as a substantive and independent period;) a general discharge of debts would, perhaps, not be an event of too remote expectancy, with reference to the Rule against Perpetuities.

But, as it is clear, that, by acknowledgments or from continuance of disability, a charge or debt may be kept alive or subsist for a longer period than twenty years, and, even, (in the case of successive acknowledgments) to an indefinite time, there is no security for the satisfaction or determination of the trust within the allowed limits of remoteness.

(*g*) See *Powell's* n. to *F. Ex. Dev.* 282—299.

Limitations in
question void
as too remote.

It seems certain, therefore, that, if the trust for payment of debts be considered as creating a contingency, whereby the period at which the subsequent fee is to take effect in defeazance of the fee vested in the trustees, must be ascertained, that period is liable to the objection of being too remote; because the event of a general discharge of debts, and, consequently, the commencement of the future interest, being indefinite, it is uncertain, in point of time, whether it may not exceed the limits allowed by law for the creation of executory estates. (h) And, treating the question as one of the validity of the ulterior limitation as a *legal* Executory devise or Shifting Use, it is plain, that this is the only light in which the contingency in question can be regarded. For, (i) although it be true, that there is nothing more to confine the effect of the words, "from and after," or, "when," &c., in construction, to the time of the actual possessory enjoyment of the interest introduced by them, than there is in the common limitation of an estate to a man, for life, and from and after his decease, then, to another, &c.; and that such words only denote the order or course of the several interests connected by them, expressing the priority or preference of the antecedent, and the posteriority or subjection of the subsequent, in point of usufructuary prevalence or effect, without preventing the latter from a concurrent operation, in attaching immediately as vested and transferrable interests in a present subsisting fund; yet, it is undeniable, that such reasonings do not go to the point of the capacity of the future limitation to take effect as a legal executory estate, the which can only be regarded in respect to the period or event whereat or whereon it is to arise, without reference to any immediate or anterior usufructuary vesting or enjoyment.

Difference
between
limitations

Perhaps, no question could ever have been entertained upon this point, but for the important difference observable

(h) *Powell's n. to F. Ex. Dev.* 296.

(i) *Powell's n. to F. Ex. Dev.* 299.

between executory estates, engrafted on a limitation in fee for payment of debts, and similar estates limited upon a pure absolute contingency, either personal to the first taker, or not. In the former case, a notion is apt to obtain, that the debts must, at some period or other, be paid, and that, in the mean time, as to the whole property, subject to their satisfaction, and afterwards, as to that portion remaining, the person entitled under the future limitation is virtually the owner. In the other case, however, until the happening of the contingency, it cannot be predicated, that the executory limitation will ever take effect at all, and there seems, therefore, a more palpable and tangible necessity for restricting it to proper bounds. But still, strict rule and just analogy do not admit of our regarding the legal operation of the future limitation, in either of these cases, apart from the event on which it is expressed to arise, although, from the nature of one of them, it may happen, that the object of the future limitation is virtually entitled prior to the defeazance of the first estate.

depending on general satisfaction of debts, and those to arise on other contingencies.

And the rule, here insisted upon, seems to hold equally, although the *quantum* or amount of the debts be ascertained and specified. For, as it has been properly said, (k) it is not the unascertained *quantum* of the charge, that renders the limitation after payment of debts too remote, as an executory or future interest, but the indefiniteness of the period or time of payment, (that is, of the commencement of the future interest,) that prevents its taking effect. The specification of the debts to be discharged advances not a step towards limiting the period of their being raised and paid: that remains equally unlimited and indefinite, whether the debts be ascertained, or not, and may equally, in point of time, exceed the period allowed by law for executory estates, and, consequently, is equally liable to the objection of remoteness.

Whether circumstance of debts being ascertained and specified affects the question.

(k) *Powell's n. to F. Ex. Dev.* 296, 297.

The impossibility of a limitation after a trust for general payment of debts taking effect as a valid legal executory estate being thus, in point of principle, established, it remains to be seen, whether such limitations can be regarded as creating present trusts in equity, to take effect subject to the general charge of debts.

To comprehend clearly the position of this question, it may be useful, to recall to mind the fact, that the complete ownership of land involves in our laws, first, the estate in the land itself, and, next, the right to take the profits; or, according to more technical phraseology, the legal estate, and the use or beneficial enjoyment. (*1*) When the legal estate is vested in one person, and the beneficial enjoyment belongs to another, they have distinct and separate estates or interests; but those interests are, nevertheless, concurrent, and vest at the same moment. Where the legal estate is vested in trust, it is a rule of equity, that so much of the trust as is not disposed of remains in the alienor, as part of his former estate. It follows, therefore, that a conveyance or devise to trustees and their heirs, to pay debts, or to them, to sell and pay debts, passes the whole estate in law to the trustee, and part only of the trust; that is, the trust to the extent of the particular purpose mentioned: and the residue of the trust will revert to the grantor, or the representatives of the devisor. This residue of the trust may, however, be disposed of, and the parties, in whose favor such disposition is made, will, in equity, be deemed the real owners, and may, at any time, come into Court, and desire the surplus of the estate, after satisfaction of the debts, to be conveyed to them. Upon the same principle, in the case of terms created by the owner of the inheritance for particular purposes, so much of the trust as is undisposed of results to the proprietor of the inheritance, and constitutes a part of that inheritance. The beneficial trust, it will be observed, is not

(1) See *Powell's n. to F. Ex. Dev.* 267, *et seq.*

to wait, for its taking effect, until the satisfaction of the debts to be paid, but confers a present subsisting interest in possession, subject only to the execution of a trust prior in the order of dispositions, but not precedent in point of time. There being, therefore, a portion of the trust or beneficial ownership capable of immediate disposition, it is matter of no moment, what is the character of the trust which is to be satisfied before that portion can be ascertained, as that affects merely the question of the *quantum* of estate to be ultimately enjoyed by the beneficial owner, and not, of the time or period of its taking effect. It seems clear, therefore, that, assuming limitations after a trust for payment of debts, embracing the fee-simple, to be void, as giving legal executory estates, they are valid, as present trusts in equity, waiting, as to the fuller ascertainment of the *quantum* of estate to be affected by them, until the performance of an act extrinsic to such limitations, although connected with another concurrent trust.

Thus much, in point of *principle* and analogy. The little *authority* to be adduced will be found confirmatory of the suggestions of theory and rule. In *Bagshaw v. Spencer*,^(m) a testator devised all his manors, lands, &c., to trustees, and their heirs, upon trust, that they should, out of the lands, &c., by the rents, issues, and profits, or by sale or mortgage of the whole, or so much as should be necessary, raise money for the payment of his debts, legacies, and funeral expenses, and then, as to one moiety, upon trust for and to the use of his nephew, T. B., for life, with remainders-over. Questions arising as to the construction of different limitations in the will, an incidental point was, whether the limitations, subsequent to the trust for payment of debts, (which, it was held, carried the whole fee to the trustees,) might be good by Executory devise. Lord Chancellor *Hardwicke* said, that the devisee could not take a legal estate by Execu-

Case of
Bagshaw v.
Spencer.

(m) 1 Ves. sr. 154.

tory-devise, for that *it was too remote*, being after all debts indefinitely be paid, *which might, in point of time, exceed a life or lives in being, or any other period allowed by law* : but his lordship took another view of the case, which showed, that, even supposing the limitation was a good devise in law, the result would be equally unfavorable to the party insisting on its validity as a legal executory estate. The opinion of Lord *Hardwicke*, therefore, cannot be treated as an express adjudication upon the point in question, although it is, doubtless, entitled to all the weight which attaches to the observations of so profound an equity judge.

Case of
Strong v. Teatt.

In the case of *Strong v. Teatt*, (a) a testator devised to his wife and her heirs, certain real estate, to the use, intent, and purpose, that his said wife should receive, out of the lands, a yearly rent-charge, for her life, and to the further use and purpose, that his said wife might, by sale of such of the said lands thereby to her devised as should be necessary, raise so much money as might be sufficient to pay off and discharge such of the said debts as should not be paid off and discharged out of his personal estate ; and as to so much of the said lands and tenements as should remain unsold, to the use of the testator's son, A. M., for his life, and after his death, to the uses therein mentioned. Ejectment being brought, by persons claiming under some of the devisees, against a party deriving title under a conveyance from the testator's heir, a chief question was, whether certain property passed under the will, and, as incidental to that, another point which arose was, whether the devisees took legal estates. The Court of B. R., in Ireland, having held, that the property in question was included in the will, also decided, that the uses were legal estates executed, subject to a charge for the payment of the testator's debts, (if any there were,) and a power in his widow to sell, for that purpose ; and were good at law, though devised after an indefinite

(a) 2 Burr. 910.

payment of such of the testator's debts as should not be discharged by his personal estate. A writ of error being brought in B. R., in England, it is stated to have been elaborately argued, upon the question, whether the parties bringing the ejectment had any legal estate : it being contended, on the part of the defendant in ejectment, that the widow took the legal fee, which descended, it was said, to her eldest son and heir, under the conveyance from whom the defendant claimed; or that, if she did not, the devises thereof after payment of debts generally were executory and too remote. The judgment of the Court in Ireland was reversed upon the point as to the property in question passing by the will, and it, therefore, became unnecessary to consider the question of the nature of the estates taken by the devisees. Lord *Mansfield*, C. J., however, took occasion to draw a distinction between the case under consideration and that of *Bagshaw v. Spencer*, before stated, which had been cited in the course of the argument, in opposition to the legal right of the claimants under the will, observing that, in the latter case, it was not necessary to decide on the nature of the estates taken by the devisees, as, even should it be held, that they took valid legal estates, such a construction would not, under the particular circumstances of that case, assist the title of those by whom it was urged. His lordship, also, observed, that, though he gave no sort of opinion upon the case before him, as to this point, it might be worth considering, whether the devise were not upon a double contingency : *viz.*, if there should be debts, then, the testator's wife to have the estate for payment of them : if no debts, then, those in remainder to take. A further writ of error was brought in the House of Lords : but their lordships confined the counsel, to speak to the point of the estates in question being intended to pass by the devise, and, the judges being of opinion in the negative, the judgment of reversal was affirmed, without any discussion upon the question of the nature of the interests limited to the devisees.

The bearing of Lord *Mansfield's* observation in this case, as it has been properly remarked, (o) is sufficient to show, that the Courts would be strongly inclined to support limitations after a trust for payment of debts on any admissible ground. It is, also, to be observed, that the reversal of the judgment of the Irish court did not diminish or affect the authority of its opinion, in respect to the operation of the limitations in the will after payment of debts.

Case of *Jones v. Say and Seal.*

In another case, the trust-estate limited for payment of debts was held to be confined to a life in being, and there was, therefore, no objection to the subsequent limitations creating legal interests; as, it was decided, they did. The case alluded to is that of lady *Jones v. lord Say and Seal*, (p) where a testatrix devised certain real estates, to trustees, and their heirs, upon trust and in confidence, in the first place, out of the rents and profits thereof, to pay the several legacies, devises, and bequests, thereafter mentioned, and, then, (after giving several annuities for life,) she appointed her trustees to pay all the rest and residue of the rents and profits of the premises, into the proper hands of her daughter, C. F., or as she, by any writing, &c., should appoint, for and during the term of her natural life; and after her, (the said daughter's) decease, the trustees to stand seised of the premises, to the use of the heirs of the body of the said daughter, C. F., severally and successively, as therein mentioned, with remainders-over. A question arising upon a recovery suffered by C. F. and her husband, it was to be decided, whether the limitations to the former, for life, and after her decease, to the heirs of her body, were of such a character, as to unite under the *Rule in Shelley's case*. Lord Chancellor *King* held, that the use was executed in the trustees and their heirs for the life of C. F., and that she had only a trust in the surplus rents and profits, during her life; but that, by the subsequent words, *viz.*,

(o) *Powell's n.* to F. Ex. Dev. 297.

(p) 2 Bro. Parl. Ca. 458.

that the trustees should stand seised to the use of the heirs of the body of C. F., subject to the payment of the annuities, &c., the uses were executed in the persons entitled to take by virtue thereof, chargeable with the payment of the annuities, and, therefore, that those different interests could not unite, so as to create an estate-tail, by operation of law, in the ancestor. No question of remoteness, it will be perceived, arose in this case; but it may, perhaps, be considered, as indicating a disposition, to limit the duration of the estate of trustees for particular purposes, and to give effect to ulterior limitations as legal interests, when an intention appears in favor of the latter construction, and violence is not thereby done to the proper effect of the limitation to the trustees, as necessarily excluding such a construction.

Again, in another case, (g) a testator, having, upon the marriage of his daughters, demised an estate, to trustees, upon trusts for raising certain sums, which were settled upon the daughters and their children, by his will, after charging the estate with other sums, to be settled upon the same trusts, with portions for sons, and with a further sum, in discharge of a mortgage of another estate, devised it unto and to the use of other trustees, upon trust, from time to time, to receive the rents and profits, and to invest the same in the purchase of stock, so as to accumulate and form a fund for the payment of the aforesaid charges; "and after the same should have been fully raised and paid," in trust, to stand possessed of the property, upon the trusts in the will mentioned. A bill was filed by the testator's heir, for the purpose of disputing the validity of the dispositions in the will; and, after argument, *Graham, B.*, sitting for Sir *Thomas Plumer, M. R.*, observed, as follows:—"It has been contended, that the plaintiff is entitled as heir-at-law, because there is a trust for certain accumulations which look to an indefinite period, and no interest is given to any

(g) *Bacon v. Proctor*, 1 Turn. & Russ. 31. And see 1 Jarm. Pow. Dev. 419.

person till after the accumulation is determined. That is not my view of the case : my opinion is, that the testator's intention was, simply, to provide a fund for some specific debts and charges, and, then, that the persons entitled should take. He had no intention of suspending the beneficial interest, in the meantime till the debts and charges should be paid. All the authorities show, that, where an estate is given to trustees to pay debts, and then to a person designated, the person designated takes at once subject to the debts." In this case, it will be observed, there could be no question, as to the limitations, subsequent to the trust for paying off the charges, passing valid legal executory estates, since it was clear, that the testator intended the legal fee still to reside in the trustees, or, at least, that he did not expressly limit it over after the satisfaction of the first trust. But the case is, nevertheless, valuable, as showing the disposition of the Courts, to treat provisions for debts as, in fact, mere charges upon the property out of which they are made.

These authorities give rise to two or three reflections, which, it seems necessary to introduce, in order to the completeness of our inquiries on this head.

The question, whether a devise in fee for payment of debts can be construed as a charge merely upon the property, considered.

1st. The opinion of the Irish Court of B. R., in the case of *Strong v. Teatt*, above noticed, and the decision in *Bacon v. Proctor*, suggest the point, as to a trust for payment of debts, though ostensibly carrying a fee to the trustees, being regarded in the light of a *charge* only upon the property, with a *power* of sale in the trustees for satisfaction of the debts. It is certainly true, that, so regarded, there would be no objection to the limitations subject to the charge, on the score of remoteness, as, upon that construction, they take effect at once, although liable to be set aside by an exercise of the power, as in the ordinary case of an immediate devise, subject to a charge of debts. But the objection to this construction consists in its total disregard of the form and proper legal effect of the limitation to the trustees : the one being a

direct gift of the estate; and the other vesting the *entire ownership* of the property in the trustees, without reference to the purpose intended to be effected by the limitation. Doubtless, the construction of a charge, with an accompanying power, fully answers the object of the gift, as, thereby, every thing can be effected, which is contemplated by a direct limitation of the estate. But, it seems a great stretch of the judicial functions, to disregard the established rules of law, from what is, at best, but an equitable though laudable consideration of the real designs of the author of the limitations, by sustaining and harmonizing his general dispositive scheme. Nor, when the case of *Strong v. Teatt* is closely considered, can it be said to form any direct authority for the construction under consideration. The wording of the limitations, in that case, was of a peculiar character, and abundantly sufficient to warrant a Court of law, anxious to uphold a testator's dispositions, in putting the construction upon them there adopted. There was no devise of the use to the trustee, except in regard to or in connexion with the particular purposes which the testator had in view in the limitation to her, and then, only as to such of the devised property as it should be necessary to dispose of, in order to answer such purposes. As to the residue of the property, in respect to which no use had been declared, the testator proceeded to limit uses; and it is observable, that the very same words ("to the use intent and purpose,") by which the testator reserved an annuity for the trustee, who was his widow, he used in declaring the trust or power of sale, being words, frequently in use for limiting or reserving estates or interests not embracing the whole fee, or not extending to the fee of the whole property devised. *Strong v. Teatt*, therefore, cannot be treated as an authority in favor of any such principle of construction as that suggested, in the case of limitations of less ambiguous import, and possessing more of the character of an express devise of the estate. We have already seen, that the peculiar nature of the devise in *Bacon v. Proctor*, does not admit of that case being adduced

as an adjudication favorable to the construction under consideration.

Perhaps, some countenance is afforded to the doctrine by the case of *Hawker v. Hawker*, (r) in which, a testator by his will devised all his real estates in several parishes, to trustees, their heirs and assigns for ever, upon trust, as soon as convenient, after his decease, to sell his estate at H., and, with the money produced by the sale, to pay his debts; and, in case the fund should not be sufficient, then, as to his estate at F., upon trust, to sell that also, in order to make good the deficiency; but in case it should not be necessary, then, as to his estate at F., and his other remaining estates, in trust, to receive the rents and profits, till his daughter came of age, and, then, to pay such of the rents and profits as had not been applied to her maintenance and education, together with the surplus money arising from the sale of his estate at F., if it should be sold, to his daughter, upon coming of age, and, from that period, to the use of the trustees, for the life of his daughter, and after her death, to the use of her children; and by a codicil to his will, in which the testator made an alteration as to the trustees, he devised to the new trustees therein named, and to the survivors and survivor of them, and the heirs of such survivor, "such estates as aforesaid, in trust as aforesaid." The estate at H., when sold, proved sufficient to pay the testator's debts. On a case from Chancery, it was held, in B. R., that the trustees, and the survivors and survivor of them, and the heirs of the survivor, took only an interest for the life of the daughter, in the remaining estates at F. and elsewhere. The line of argument adopted at the bar, and which must be presumed to have influenced the Court, was, that the words in the will, as to the sale of F., were conditional, as the testator only directed a sale, in case the estate at H. should not prove sufficient; and that he expressly contemplated the probability of no such necessity

(r) 3 B. & Ald. 537.

existing; and, therefore, in the event of its not being required, gave the property to the same uses as the other estates; and that, until the necessity arose, the estate should pass to the persons, for whom the uses were declared; a power of sale only immediately vesting in the trustees, as in the case of a devise, that land should be sold by executors. This, it will be observed, was not an adjudication upon the simple question, whether every devise in trust for payment of debts creates any thing more than a charge, with a power to sell, but, whether the difference in the trusts declared of the estate at F., from those expressed as to the H. estate, was not such as to render it clear, the testator intended, in regard to the former, to invest the trustees with a power only. The real question would have occurred for consideration, had a sale not taken place, or had not been necessary, of the estate at H. But the decision, doubtless, evinces a disposition, to construe trusts of this kind, rather, in the light of powers or authorities, than, of express limitations of the estate. And, if the fact, that the trust for sale of the F. estate was made contingent on the circumstance of a necessity existing for its exercise, had any weight with the Court, it becomes a serious question, whether *every* trust for sale for payment of debts may not be so considered, for all such trusts are created only as auxiliary to the personal estate, and are also intended to affect the property subject to them, only so far as the fulfilment of that office may require. But, too much reliance cannot be placed upon this conjecture, the reasons for the opinion of the Court not being given.

In fine, it must be admitted, that, besides the deficiency in authority, the doctrine in question is attended by so much of theoretical difficulty, that nothing but an exclusive regard for convenience could ever induce a Court of law to give it the sanction of a settled rule.

2. The above-quoted observation of lord *Mansfield*, in the case of *Strong v. Teatt*, suggests the question, as to how far trusts for payment of debts and gifts subject to them may be regarded in the light of limitations on double contingencies:

The doctrine, that a devise in fee for payment of debts is only a charge, insupportable.

Whether limitations in question can be considered as gifts with double contingencies.

as, if there are any debts, or, in case of a deficiency of personal assets to discharge debts, to the trustee; if no debts, or if no deficiency of assets, then, to the persons who are to take beneficially. Such a construction has the advantage of not being at variance with any established rule of law, as is (apparently) that just disposed of. But it seems inadequate for any effective check to the stringent operation of the perpetuity-rule upon the class of limitations under consideration. For, how could the alternative of there being no debts, be said to be realized, if there were any, the smallest, unsatisfied obligation, embraced by the provision? And if the other alternative have any effect, however inconsiderable, where is the preventive of the violation of the Rule against Perpetuities, so far as respects the validity of the ulterior limitations, as passing legal estates? or, if the contingency were a deficiency of personal estate, would not the smallest inadequacy suffice to give effect to the provision for debts, and, therefore, to leave in full force the operation of the perpetuity-rule, as to the legal effect of the ulterior limitations?: although, by the construction in question, they might take effect as legal estates, if there should be a *sufficiency* of assets; and *that*, (as it should seem) without regard to such fact being ascertained immediately on the decease of the testator.

This doctrine, if sustainable, an insufficient answer to objection of remoteness of limitations after devises in fee for payment of debts.

These considerations show, that the construction of a provision for debts being merely a limitation on a double contingency, would but palliate the inconvenience of the strict rule, which otherwise denies validity to the ulterior limitations as legal executory estates. As before observed, however, so far as it may serve that end, there seems no antecedent objection to it, upon the ground of any rule of law: the contingency contemplated is one which must be ascertained (either in fact, or by eventual relation,) at the death of the testator; and it must, according as it happens or not, at that time give effect to or intercept the limitations subsequent to the provision for debts, as valid estates at law. But, it will be remembered, that this view is entirely conjectural,

and destitute of any considerable judicial sanction; although it is recommended by that manifest convenience, to which, the present temper of our Courts is not indisposed to give attention.

3. A third observation occurs with respect to this class of limitations, not immediately connected with the authorities which have been noticed. It is, that the character of a charge or trust for payment of debts on real estate is much altered, and its importance diminished, by the statute, 3 & 4 Gul. 4, c. 104, rendering the freehold and copyhold estates of deceased persons, assets for the payment of their debts of every description. An argument might be derived from this change of the law, to the effect, that, since all debts are legally payable out of real estate, any trust or provision for their satisfaction is, in fact, nugatory, so far as the liability of such estate to those debts is concerned; that every devise of property, although not expressly referring to or providing for debts, is, in reality, subject to their discharge, by mere operation of law, and cannot, therefore, have complete effect, until that discharge takes place; and that, consequently, to render a limitation void, as an estate at law, for remoteness, by reason of its being expressly postponed to a provision for debts embracing the fee-simple, is to retain the shadow of a distinction, while the substance no longer exists.

Circumstance of realty being rendered legally liable to all debts tends to assist limitations subsequent to provisions for their satisfaction.

There seems much weight in these considerations; though it may, perhaps, be doubted, whether they are, at best, of more than an equitable character. It may be asked, what is the object of a trust for payment of debts? and what is the purpose to be effected by it? Clearly, to enable the trustee, by sale or mortgage, to raise the fund requisite for the satisfaction of the debts: with that, his power and duty end; and the beneficial interest of the ulterior devisee thereupon accrues. But, what, it may be said, is there, in this, that cannot be equally effected, by means of a suit in equity, although an express charge or provision be wanting? And what substantial distinction, therefore, is there,

But this no sufficient argument against remoteness of such limitations, at law.

even at law, between the position of the devisees subject to the trust for payment of debts, in the one case, and the immediate devisees, in the other? The difficulty, it must be confessed, in the way of the conclusion to which this reasoning leads, consists in the existence of an express devise in fee for satisfaction of the debts; a limitation which, as to the legal operation of the gifts subject to it, must be regarded abstractedly from the purposes it serves, and cannot be determined with the answering of those purposes, otherwise than by a valid Executory devise, to take effect on that event; the existence of which is the very question under consideration. And this, it will be remembered, is the same objection which attaches to the construction of trusts for payment of debts, as mere *charges* for that purpose: it implies a disregard of the essential feature of such trusts, as express limitations of the estate; the character, extent, and effect of which, must be decided upon strict legal rules, hitherto jealously guarded from intrusion.

Inclination of Courts probably favorable to limitations in question.

How far the influence of one or more of these reflections, combined with the consideration of the convenience of some escape from the rigorous application of the perpetuity-rule in the class of cases here considered, may induce our judges to sanction and establish limitations after provisions for payment of debts, as valid legal estates, it would be premature to determine; although the writer inclines to think, that some effort towards such a conclusion will be made by our Courts of law, whenever the question may directly demand consideration.

Same rules applicable to limitations in deeds, after provisions for payment of debts embracing fee.

It may be remarked, that, although reference has been here principally made to limitations after *testamentary* provisions for payment of debts, limitations by deed, after conveyances in fee for a like purpose, are in the same predicament; the question being, in that case, whether the ulterior gifts can take effect as *Shifting Uses*, and not, as Executory devises. (rr)

SECTION II.

Limitations after or subject to a trust of accumulation of income for renewal of unexpired leases.

THE first observation which occurs with respect to this class of limitations, is, that the mere circumstance of such trusts being unlimited will not, of itself, render them void; for, as the duration of terms of years is determined and fixed, the period during which they have to run must be deemed to be actually specified in the limitation, as ascertaining the extreme limit of its operation. Whenever, therefore, trusts of the kind mentioned have reference to leases, whose unexpired term does not exceed twenty-one years, (for lives in being cannot, of course, form part of the period of remoteness, when none are selected by the author of the limitations,) they are valid, without being expressly restricted to that limit of time, as they are, *ex necessitate*, confined to a period which is not too remote; and all limitations subject to such trusts are, consequently, so far as respects their connexion with these, valid also.

If unexpired terms of leases not greater than twenty-one years, these limitations not too remote.

But, when the unexpired term of the leases exceeds twenty-one years, and there is, therefore, nothing to necessitate a renewal within that time, a trust for accumulation of income, in order to such a renewal, must be void, as not necessarily to take effect within the prescribed limits of remoteness; and all limitations subject to that trust are, also, void. In that case, they are within the general operation of the Rule against Perpetuities, which is violated, unless the limitation be expressly restricted to take effect within a life or lives in being and twenty-one years, or, within twenty-one years, simply.

But if unexpired portion of leases exceed legal limits, limitations after trusts of accumulation for their renewal, too remote.

Where, indeed, the property, which is to be benefited by the trust for renewal, is so limited, as that there will, of a

If a right will certainly exist in some person

interested in lease to be renewed, to put an end to accumulation, within proper period, limitations in question good.

certainly, be a vested interest in the property, and, therefore, in the accumulated fund, in some person competent to deal with both, within the prescribed period, the trust for renewal, though in itself unrestrained and too remote, will be good, by reason of the extrinsic circumstance, that there must be a person having power to prevent the further accumulation of the fund, within the legal period, and, therefore, to avert the mischief which the law desires to avoid.

But, this power must be one that will necessarily exist and be exerciseable, and not merely such as can be put in use only by the voluntary coalition or agreement amongst themselves, of persons severally interested in the property; and, therefore, a limitation to a class of persons, after a prior gift for life, though to vest within the prescribed limits, is not such as will validate an unrestricted trust for renewal, since there will not necessarily be a right in any one person to put a stop to accumulation, and deal with the accumulated fund, within the proper period.

Circumstance of lease being limited for life, and possibility of continuance of such life beyond the lease, not sufficient to support these limitations.

And so, also, it is not a sufficient argument, in support of the validity of these trusts, that the property, to be benefited by the renewal they provide for, is given to a person *in esse*, for life, and that it is possible, such tenant for life may live throughout the whole period which the leases have to run, and that they may, therefore, eventually be renewed without violating the Rule against Perpetuities. This event is merely, what it pretends to be, a contingent possibility; the which, it is needless to remark, can never satisfy the perpetuity-rule.

Case of *Curtis v. Lukin*.

An instance of this class of limitations occurred in the recent case of *Curtis v. Lukin*, (s) where a testator bequeathed certain leasehold messuages, to trustees, in trust for his niece, E. C., for life, for her separate use, and after her decease, in trust for any children the said E. C. might leave, to be divided equally between them, with limitations-over; and, after certain intermediate bequests, the testator

(s) Reported in 6 Jur. 721.

gave other leasehold property to the same trustees, in trust, to receive the rents thereof, and lay out the same at interest, until the term which should be held in his said leasehold messuages, thereinbefore bequeathed to the said E. C. and her children, should be nearly expired, and, then, to pay and apply such part thereof as should be necessary, in the renewal of the same leasehold messuages, for the benefit of the respective persons to whom he had before given the same; and as to the money arising from the rents of the said houses lastly bequeathed, and the interest arising therefrom, after answering the purposes aforesaid, in trust for E. V., S. V. C., and E. C., equally to be divided between them; and the testator gave the residue of his real and personal estate, as therein mentioned. The leases of the houses bequeathed to E. C. and her children had, at the time of the testator's decease, respectively, sixty-two years, and sixty-eight years, to run. E. C. entered into the possession of the houses bequeathed to her, and had ever since continued in the enjoyment thereof. The trustees accumulated the rents of the houses secondly bequeathed, for some years after the testator's death, and then distributed the accumulations amongst the testator's residuary legatees. A bill was filed against the representatives of the trustees, charging that the latter ought to have accumulated the rents of the houses secondly bequeathed, for the purpose of renewing the leases of those first-mentioned; and praying, that it might be declared, that the trustees had committed a breach of trust, and were liable to make good the fund which ought to have been accumulated, and that a competent part of such fund might be applied in renewing the first-mentioned leases. One of the grounds of defence to the bill was, that the trust for accumulation was void for remoteness; in support of which, it was contended, that the enjoyment of the accumulated fund might have been suspended for a longer period than a life or lives in being and twenty-one years; and that it was not sufficient, to take the

case out of the Rule against Perpetuities, that E. C. might have lived through the whole period for which the leases had to run, or that parties might be ascertained, within the time limited by law, competent to dispose of the fund. Lord *Langdale*, M. R., held, that, as it was the intention of the testator, that the accumulation should go on, until a period expired, that might be beyond the limits fixed by law, and which could not be prevented by any power given in the will, but only, if the parties entitled came to an agreement amongst themselves, the trust for accumulation could not be sustained, and the bill must be dismissed. In this case, it will be observed, the limitation subject to the trust of accumulation was treated as void for remoteness, the accumulated rents being paid to the residuary legatees, as such ; although, it is true, they were the very individuals, in whose favor the limitation subsequent to the invalid trust was made. There cannot be a doubt, that such limitation was void, seeing that it was not to attach, and could not attach, until complete satisfaction of the directions to accumulate, which were too remote.

In the late case of *Boyd v. Buckle*, (t) also, there was a similar direction for accumulation, until the expiration of a term in a leasehold estate bequeathed by the will ; although the trust of the accumulations was not for renewal of the lease, but, for the benefit of the persons, whose income under the will would suffer by its expiration : as, however, the lease had only four years to run at the testator's death, no question of remoteness arose on the construction of the will.

If expiration of leases properly restricted, no objection to these limitations.

When there is an express provision, that the expiration of the leases, which is to give effect to the trust of accumulation, shall happen within the proper period of a specified life or lives and twenty-one years, it is, of course, clear, that the limitations subject to such trust are perfectly valid.

If trust of

It will be hereafter seen, that, when the trust of accumu-

(t) 10 Sim. 596.

lation is merely *engrafted on* limitations, in themselves valid, and otherwise of immediate operation, any invalidity that may attach to the former, will, in no wise, affect the latter, which are, in that case, simply disencumbered of the void directions for accumulation.

accumulation merely engrafted on limitations otherwise valid, latter not affected.

It is almost unnecessary to remark, that, in the case of trusts of this kind being declared by deed, the period of its execution is the time from which the unexpired term of the lease must be computed; and that, where created by will, the computation is to be made from the death of the testator.

Period from which computation of unexpired term must commence.

SECTION III.

Limitations of personal chattels to go or descend as heir-looms, with real estate entailed in strict settlement.

IN order to a clear conception of the nature of the limitations here alluded to, the student must be apprised, that, on settlements of family-estates, in the usual mode of entail, it not unfrequently happens, that there are certain chattels personal, such as, furniture, plate, pictures, &c., previously held with the property, which, it is desired, should be transmitted and enjoyed together with the settled estates, as appurtenant to these. To effect this purpose, it is sometimes provided, by a clause in the settlement, that these articles shall be held by the trustees, to whom they are limited, in trust for the persons for the time being entitled under the limitations of the real estate, or, according to technical phraseology, as heir-looms. Under such a trust, it is plain, the chattels vest absolutely in the person first becoming tenant in tail by virtue of the settlement; (u) that, as has been before

Explanation as to nature of these limitations.

(u) *Foley v. Burnell*, 1 Bro. C. C. Carr v. lord Errol, 14 Ves. 478.
274. *Vaughan v. Burdett*, 3 ib. 10

observed, being always the effect of a limitation of personality, directly or indirectly by words which would create an estate-tail in realty. Upon the assumption, therefore, that the limitations of the settled estates are valid, there can be no objection, in point of remoteness, to gifts of chattels of the kind supposed.

And it is to be observed, that, although the trust be, for the persons for the time being *in possession*, under the limitations of the realty, the title of the tenant in tail, to the absolute interest in the chattels, will, not depend on his actually coming into possession of the property, by surviving prior tenants for life; for, as lord *Loughborough* once remarked, (v) if the chattels do not vest, in the case of an infant tenant in tail dying before his estate becomes possessory, neither can they, in that of a son attaining twenty-one in the life of the tenant for life; and the testator or settlor could have had no idea of a case, in which the real estate might be sold, and yet the chattels remain.

Intention generally is, that chattels shall not vest absolutely in tenant in tail dying under twenty-one without issue.

But, it is generally desired, that no tenant in tail shall acquire the absolute interest in the chattels, unless he lives to enjoy full power over the settled estates, or his remainder in tail therein, (which is not the case until his attainment of the age of twenty-one,) or unless he dies, without acquiring that power, leaving issue inheritable to the entail. The consequence of not providing for the contingency of the tenant in tail not attaining twenty-one, or of his death under twenty-one without issue, is, that the enjoyment of the settled property and the accompanying chattels may be severed at an unnecessarily early period; as, supposing the chattels to be absolutely vested in the tenant in tail on his birth, they will belong to his personal representative after his death, (without reference to his leaving issue surviving, or not,) who will, in all probability, be a person unconnected with the succession to the landed property.

Effect of, "as

To meet this contingency, it is frequently provided, that

(v) In *Foley v. Burnell*, *ubi supra*.

the chattels shall, *as far as the rules of law and equity will permit*, be held upon the same trusts as those declared of the settled property. By virtue of this provision, a settlement of the chattels, similar to that of the real estate, may be effectuated, though not to the full extent permitted by the Rule against Perpetuities, yet, so as to carry out the intention of linking together the real and personal estate, to a convenient extent allowed by law. (w) It follows, therefore, that, in the event of the *death of the first tenant in tail under twenty-one without leaving issue*, the property will go over to the next succeeding tenant in tail, and, so on, to the others, till one of them attains twenty-one, or dies under that age leaving issue; as the event of a tenant in tail living to the age of twenty-one can never, according to the usual mode of settlements, exceed the period of lives in being and twenty-one years; although, of course, if, by reason of the parent of the tenant in tail being unborn, or otherwise, the birth of such tenant in tail may be postponed beyond a life in being, no limitation, to take effect in the event of his not attaining majority, can be allowed.

far as the rules of law and equity will permit," for this purpose.

It has, indeed, been said, (x) that chattels, directed to go as heir-looms with an estate, "as far as the rules of law and equity will permit," vest in the first tenant in tail who comes *in esse*; but the manifest intent and just effect of those words, and the general usage and opinions of practitioners, alike lead to a contrary conclusion.

To avoid doubt upon this point, an express provision is not uncommonly met with, to the effect, that the chattels shall not, for the purpose of transmission to representatives, vest absolutely in any *person made tenant in tail by purchase* of the settled estates, *unless or until such person shall attain the age of twenty-one years, or die under that age leaving issue inheritable to the entail*. This provision, it is manifest, offers

Express provisions, that chattels shall not vest absolutely in tenant in tail unless he attain twenty-one or die under that age leaving issue.

(w) See *Newcastle v. Lincoln*, 12

5 Madd. 337.

Ves. 218; *Southampton v. Hertford*,
2 Ves. & B. 63; *Gower v. Grosvenor*,

(x) See *Vaughan v. Burslem*, *ubi supra*; *Lewin on Trusts*, 72.

no violation to the Rule against Perpetuities, as connected with the ordinary series of limitations in settlements, for, as the children of persons *in esse* are generally made tenants in tail, any limitation, contemplating the contingency of their deaths under twenty-one, must be valid; although, as was above noticed, if the tenants in tail will not necessarily be born (if at all) at the expiration of lives in being, any limitation, providing for the event of their deaths under twenty-one, must be void, as too remote.

It will be observed, that this provision merely meets the case of a tenant in tail, *by purchase*, dying under twenty-one, and not, of such a contingency happening with respect to an *heir* in tail, claiming under a tenant in tail having or not having attained twenty-one; and in the event, therefore, of such tenant in tail by purchase dying under twenty-one, leaving issue, the chattels would vest absolutely in the heir in tail, although he might die in his minority: and it is needless to observe, that any provision, applicable to the case of a tenant in tail, *by descent*, dying under twenty-one, would be void, as too remote, that contingency not necessarily happening, if at all, within the prescribed limits.

Thus far, we have considered the modes in which chattels personal may be limited as heir-looms, without any contravention of the provisions of the perpetuity-rule.

Limitations of chattels to go as heir-looms, which are partially exposed to objection of remoteness.

Resort has, at times, however, been had to this kind of settlement of chattels, in apparent reference to the legally established distinctions with respect to it, but in a manner to occasion an infringement of the Rule against Perpetuities. The most frequent instances of attempts of this kind are to be found in those cases, where it is desired to limit plate, &c., so that it may attend the descent of a title or dignity, and may be enjoyed in succession by the inheritors of it. In such cases, it seems, that the operation of the perpetuity-rule is not, wholly to vitiate the trust declared of the chattels, as in the case of a class of persons taking *concurrently*; where, if the gift be bad as to some, on the ground of perpetuity, it is void

as to all, since it is impossible to determine, what shares, those members of the class, as to whom the gift might have been good, are to take; but the effect of remoteness attaching to any of the remoter links in a chain of *successive* trusts, of the class under consideration, is, for the most part, to invalidate all subsequent to the first, which takes effect; as it must necessarily happen, that the person first becoming interested is a valid object of the limitation, or it would be void *ab initio*.

Thus, in the case of lord *Deerhurst* v. duke of *St. Albans*, (y) formerly noticed, (z) lord V. bequeathed to trustees, all his household goods, furniture, pictures, books, linen, &c., upon trust for his wife, for her life, and after her death, for his son, A. B., for his life, and upon the decease of the survivor of the wife and son, in trust for such person as should from time to time be lord V., it being the testator's will, that the goods, &c., after the decease of his wife, should, from time to time, go and be held and enjoyed with the title of the family, as far as the rules of law and equity would permit. The title of lord V. descended on the testator's son, A. B., on whose death, it devolved upon *his* son, (who was living at the decease of the testator,) and upon the death of the grandson, it descended to the testator's great-grandson, who was born after the testator's decease. A dispute as to the title to the chattels arose, between the personal representatives of the grandson and those of the great-grandson. Sir *J. Leach*, V. C., held, that, as, by the rules of law of equity, every person living at the death of the testator, who should become a lord V., might be limited to the use and enjoyment only, with remainder to the next successor, the son and grandson of the testator were limited to the use and enjoyment only; but that the great-grandson, not being *in esse* at the testator's death, took an absolute interest, which was vested in his personal representative. The

Case of
Tollemache v.
Coventry.

(y) 5 Madd. 232; S. C. *sub nom.* Bligh, N. S., 547.
Tollemache v. earl of *Coventry*, 8 (z) *Vide supra*, p. 467.

case coming ultimately before the House of Lords, it was held, that it was not allowable to rely upon the fact of the individual, who first became entitled under the limitation for the lord V. for the time being, happening to be a person *in esse* at the death of the testator, and, that, as the event might have been otherwise, no ulterior gift to the succeeding lord V. could be valid, and, consequently, that the grandson became absolutely entitled to the chattels.

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upon *Tolle-
mache v.
Coventry*.

In this case, it will be perceived, that the words, “as far as the rules of law and equity would permit,” could not be allowed their usual effect, of validating the trust of the chattels to a reasonable extent permitted by law, as there were no antecedent limitations, in favor of persons expressly defined, within the range of perpetuity, in reference to which, the trust might take effect, in the event of the deaths of any of the individuals first taking under it, within the prescribed limits of remoteness. As Lord *Brougham* remarked, on the appeal,—“A limitation to be supported, must be definite and certain to the man, or to the peer as an individual: it is not allowable to contend that, at one time and for one purpose, it is to the man, and, for another time and purpose, to the peer: the estate must be certain, so as within the time to vest in the person described, either in his natural or in his politic capacity: in the politic capacity, there was no such lord V. *in esse*, in whom the estate would within that time certainly vest.” The rules of law and equity did not permit the limitation of the chattels to take effect in favor of any other than the person first answering the description of lord V., as it was not certain, that the next successor to the title would be an individual capable of taking within the limits of the Rule against Perpetuities; but, as to the person *first* taking, or answering the description requisite to take, under the gift to the successive inheritors of the dignity, it was clear, that he *would* be capable, inasmuch as, if there were any succession at all to the barony, such person would be ascertained at the decease of the survivor of

the testator's wife and son, (to whom express life-interests were previously limited) when the limitation in question was to take effect.

When, however, the gift in favor of the line of inheritors to the title, is not preceded by any express limitation to persons *in esse*, but constitutes the first or only disposition, there seems to be considerable ground for supposing, that the absolute interest will not vest in the first taker, but that the intention will be strictly effectuated, as regards such person, by confining him to a life-interest, and allowing the absolute ownership to pass to the next successor; who must, necessarily, be a valid object of gift, since he will take on the decease of a person who (upon the hypothesis) is *in esse*. (a)

Another and somewhat different instance of a remote trust of chattels to descend as heir-looms occurred in the recent case of *Ibbetson v. Ibbetson*, (b) where a testator devised his reversion in fee, expectant on his decease without issue male, in a mansion-house and estates at D., to his brother, Sir C. I., for life, with remainder, to trustees, to preserve contingent remainders, with remainder, to the first son of the said Sir C. I., in tail-male, with divers remainders-over; and the testator bequeathed to trustees, all his plate, pictures, books, and household furniture, in and about his said mansion-house at D., upon trust, to permit the same to be used and enjoyed by the person and persons who for the time being should be entitled to the possession of his mansion, under or by virtue of the settlement made upon his marriage, or of the limitations contained in his will, *until a tenant in tail of the age of twenty-one years should be in possession of his mansion-house*; and, then, the plate, pictures, &c., were to go and belong to such tenant in tail. After the decease of Sir C. I., a bill was filed against his eldest son and the personal representatives of the testator, charging, that the trust declared by the will of the plate,

Case of
Ibbetson v.
Ibbetson.

(a) *Vide Bacon v. Proctor*, 1 Turn. that case, *supra*, p. 472.
& Russ. 31; and observations upon (b) 10 Sim. 495.

pictures, &c., in and about the mansion-house at D., were void for remoteness, and that the chattels, therefore, constituted part of the testator's residuary personal estate, and ought to be applied to the payment of his debts. It was insisted, in support of the bequest, that the limitation was necessarily divisible into two parts, and that, though a gift to the first person, who should be tenant in tail in possession and attain twenty-one, might be void for remoteness, yet, that the disposition of the property during the intervening period, to the person for the time being in possession of the mansion-house, was valid, and that, if the existence of the tenant in tail, and his attainment of twenty-one, were events too remote for the law to contemplate, then, the gift of the property until those events happened, was equivalent to a gift forever. It was, also, said, that a limitation of chattels, to be enjoyed by the successive occupants of settled estates, was one, which, though not capable of having full effect given to it, would be executed *cy-près*; upon which construction, the property is given to the first tenant for life, and then, to the first tenant in tail absolutely. It was, further, urged, in favor of the disposition of the chattels contained in the will, that, where there is a trust in favor of a class of persons who are to take successively, the individuals of that class will take, unless there might have been in the series of limitations, other persons who might have come in before them, and with respect to whom, the limitation would have been too remote; which was not the position of the eldest son of Sir C. L. Sir L. Shadwell, however, after remarking upon the absence of any qualifying words, such as, "as far as the rules of law and equity will permit," said, that the trust was so expressed, that, if it were literally carried into effect, it might have happened, that no tenant in tail of the age of twenty-one years might have come into possession for two centuries, and, consequently, that the absolute interest would not have vested during that time; and the fact, that a tenant in tail of the age of twenty-one years had actually become pos-

sessed of the mansion-house, within the space of twenty-one years from the death of the testator, was immaterial, as the gift must have been so limited as, of necessity, to vest the absolute interest in some one within the period allowed by law: and the learned judge decided, that, so far as the gift was framed to take effect after the death of Sir C. L., it was void; although, whether it was good, as a gift to him for life only, and void, as a gift in remainder after his death, or, whether it might be construed as a gift absolutely to Sir C. L., it was not necessary to decide, as Sir C. L. was residuary legatee. By the decree, it was declared, that the plate, pictures, &c., fell into the testator's residuary personal estate, after the decease of Sir C. L.; which, of course, amounted to a decision, that the chattels vested in Sir C. L., under the bequest to the persons for the time being in possession of the mansion-house, for his life only. This decision was affirmed by Lord *Cottenham*, C., on appeal.

Here, it will be observed, the chattels were to be enjoyed by the successive occupiers of the settled property, until a tenant in tail should attain twenty-one, and as the contingency was not confined to persons made tenants in tail by *purchase*, but equally contemplated the attainment of the specified age by any *heir* in tail, the ulterior gift was, clearly, too remote. As, however, that event was not inseparably connected with the intermediate trust, for the persons for the time being in possession of the settled estate, it was not an unavoidable alternative, to hold the trust entirely invalidated by the remoteness which attached to the contingency that limited its duration. But, further, there was no necessity to reject the limitation, so far as it was intended to take effect in favor of valid objects of gift; and it is in this light, that the apparent disinclination of the Court, to support the limitation to any greater extent than that of its passing a life-interest to the person first answering the description, is somewhat inexplicable. It cannot be said, that there would have been any substantial objection to a construction, carrying the property to the

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individual *secondly* becoming entitled after the testator's death, (that is, the eldest son of Sir C. L.,) seeing that he must so succeed, if at all, *at the decease of a person necessarily in esse* when the will took effect. And it seems equally clear, that such second taker might have been held to be entitled to the *absolute interest*, inasmuch as, when there is a limitation, which, standing alone, would so operate, circumscribed by an event of too remote contemplation, that limitation must, (as it would appear,) be construed irrespectively of the invalid ulterior gift,—in the same manner, in fact, as if it had been absolute and unlimited in point of duration, or independent of any future contingency. And upon this reason, it is plain, that, even were it considered impossible to carry any interest in the property to the person *secondly* answering the description, the *absolute interest* belonged to the first taker, although the Court seemed unwilling to express an opinion favorable to that construction. (bb)

Case of
Trafford v.
Trafford.

A case remains to be noticed, which, on the first impression, it seems difficult to reconcile with the principle of some of the decisions we have mentioned: it is that of *Trafford v. Trafford*, (c) before Lord *Hardwicke*, where S. T., after devising all his manors, &c., to several persons, and their respective issue, in strict settlement, bequeathed all his plate, books, pictures, and household goods, to such male person, when he should attain twenty-one, who should then be entitled to the trust in possession of his real estates before devised; and the testator directed, that, till such male person should attain twenty-one, the said plate, books, &c., should be kept at D., (one of the estates devised,) and be used in the mean time by such male person residing there; it being the testator's desire, that the said plate, books, &c., *might, in the nature of heir-looms, go with the said estate, and be used therewith, as long as the laws of this realm would permit.* It was contended, on the one hand,

(bb) These observations are in every respect of equal force in reference to the case of *Kerr v. lord Dungannon*,

stated, *supra*, p. 473.

(c) 3 Atk. 347.

on behalf of an infant tenant in tail, that the chattels ought to go as heir-looms, as far as by law they might; while, on the other, it was urged, (as it would seem, by a tenant for life, or his representatives,) that the chattels should vest in the first taker, whether tenant for life, or tenant in tail, and that he should have the absolute property at twenty-one. The Lord Chancellor held, that the first part of the bequest applied to a person entitled to the *inheritance* attaining twenty-one, and not, to a male person being tenant for life merely; and decreed, that the chattels should go as heir-looms with the real estate, as far as by the rules of law and equity they might, and that the plaintiff, tenant in tail, would be entitled to the property thereof, in case he should attain the age of twenty-one years.

The distinction, between this case and that of *Ibbetson v. Ibbetson*, consists in the circumstance, that the trusts declared of the chattels, in the former case, were, substantially, a limitation of them to go as heir-looms, as long as the rules of law would permit, while, in the latter, there was an absolute limitation of them until some tenant in tail should attain twenty-one. And, if it be said, that, the bequest in *Trafford v. Trafford*, to the first male person in possession who should attain twenty-one, being connected with the direction, that the chattels should go as heir-looms, the limitation was the same with that in *Ibbetson v. Ibbetson*, it may be answered, that there was wanting in the latter case, that declaration of the testator's intention with respect to the bequest, which, in the former, effectually served to control any tendency to remoteness. It will be observed, moreover, that the Court did not declare, that the suspension of the vesting of the chattels would, in all events, be good, until some tenant in tail should attain twenty-one, but, merely, that the claiming tenant in tail would be so entitled, in the event of his attaining that age: and, doubtless, had he died *under twenty-one without issue*, the limitation would have carried the chattels to the next tenant in tail, by purchase,

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who should attain twenty-one, or die under that age leaving issue; although, of course, the vesting in an *heir* in tail could not be suspended until his attainment of majority. Notwithstanding these considerations, however, it may, perhaps, be deemed questionable, whether the decision in *Trafford v. Trafford* could, at this day, be supported, to its full extent. (d)

The doctrine, that limitations of chattels to successive takers of realty may be

It remains, to remark upon a doctrine of construction, in reference to cases of bequests of chattels to go as heir-looms, suggested by Sir *John Leach*, in the before-cited case of lord *Deerhurst v. duke of St. Albans*, where that learned judge ob-

Lord Eldon's strictures upon *Trafford v. Trafford*.

(d) Lord *Eldon* thus remarked upon the decision in this case, on delivering his sentiments, in the House of Lords, in the case of lady *Lincoln v. duke of Newcastle*, 12 Ves. 232, (stated and observed upon, *supra*, pp. 580, 581):—"Upon that case, which is very material, another observation arises, that I never could displace; forming to it, as an authority, a considerable objection, that has never been answered. The words are not, 'issue male,' but, 'such male person.' First, that was clearly an executory trust; next, the limitation was, expressly, when the party should be twenty-one; and not only that; but it was, to the person entitled to the trust in possession. One question was, whether the tenant for life at the age of twenty-one would take. To that, it was answered, very satisfactorily, that could not be; as the testator, having created interests, in the nature of heir-looms, in those chattels, must have intended those terms to apply to such persons as would take heir-looms; that is, those who would take estates of inheritance; and, therefore, the tenant in tail, before the age of twenty-one, would not be entitled to have that property given to him. The report in *Athys* is not

correct, representing Lord *Hardwicke* to state himself to have decreed in *Gower v. Grosvenor*, when no decision of this point was made in that case. But his lordship is represented to state his opinion, that it amounted to a direction to settle; and, in this, the report is correct. This seems to have escaped Lord *Hardwicke's* mind. If the limitation had been to such son, at the age of twenty-one, as would be entitled to the trust in possession of the real estates, as the son must attain the age of twenty-one within twenty-one years after the expiration of the life of his father, allowing the period of gestation, that limitation would be within the limits permitted to Executory devises. But the words are, 'such male person.' A son might die during the life of his father, under the age of twenty-one, leaving a son, who might not attain the age of twenty-one for a considerable time; and who, also, might die under twenty-one, leaving a son; who might be the first person, attaining the age of twenty-one, and entitled to the trust in possession. A considerable question, therefore, in that case, totally overlooked, was, whether the limitation, taken altogether, was not wholly too remote."

served as follows (e):—"I think, no person can take under a description by class, if, prior to him in that class, there might have been persons, with respect to whom that limitation might have been too remote: he may take by class, if prior to him there could not, by any possibility, have been any person, with respect to whom that limitation would have been too remote." This doctrine is not noticed, as now possessing any claim to a binding rule of construction, for it was practically overruled by the decision of the House of Lords, in the very case in reference to which it was mentioned, and, also, by the decision in *Ibbetson v. Ibbetson*. The effect, it will be perceived, of such a doctrine, is, to enable a *descendant*, however remote, of a tenant in tail, *actually becoming capable within the allowed period*, to take under a limitation to successive occupiers, and to vitiate subsequent limitations to collaterals or strangers, which are to wait for effect till the failure of issue of the prior tenant in tail, although to persons *in esse*: for, upon the former hypothesis, there could have been no prior person, with respect to whom the limitation would be too remote; while, upon the latter, there *might* have been such a person, as the whole line of issue of the prior legatee were to fail, before the succeeding one was to take. But, it is clear, that, in both such cases, this doctrine operates in contravention of settled principles. As to the first, it is a well-established rule, that regard cannot be had to actual events: the objects of a limitation must be such as will *necessarily* take, if at all, within the prescribed period: and, in respect to the other supposed case, we have seen it to be a doctrine of law, that, either, by the words, "as far as the rules of law and equity will permit," or, by an express provision, the vesting of chattels may (as settlements are usually framed) be suspended, as regards any number of successive tenants in tail, by purchase, until the attainment, by some one of them, of twenty-one, or until his

good as to all persons in the line, prior to whom there could not be objects too remote, examined and dissented from.

(e) 5 Madd. 271.

death under that age leaving issue ; and that, upon the happening of such a contingency with respect to the first tenant in tail, the next in succession may take, although, prior to him in the order of limitations, there might have been persons (*ex. gr.*, issue of unborn issue of the tenant in tail,) who might have come in or succeeded before or instead of him, and with respect to whom, a direct gift would have been too remote. The doctrine, therefore, though plausible and recommended by its apparent simplicity, is unsustainable, as being at variance with both principle and authority.

CHAPTER XXXI.

OF THE CONSEQUENCES OF REMOTENESS IN LIMITATIONS,
UNDER THE RULE AGAINST PERPETUITIES.

HAVING hitherto discoursed on the general operation of the Rule against Perpetuities, as it respects the various kinds of limitations of future interests in real and personal property, it may be proper, summarily to consider the immediate effects or consequences attending the remoteness of limitations; although it has unavoidably occurred, that this consequential operation of the Rule has constantly presented itself, in the course of our inquiries as to the particular classes of limitations within the scope of its influence.

The effects of remoteness in a limitation may be considered; 1st, As to the prior limitations; 2dly, As to the objects of the void gift; and, 3dly, As to the subsequent limitations.

1st, *As to the prior limitations.* The invalidity of a limitation on account of remoteness places all prior gifts in the same situation, as if it had been entirely omitted from the dispositive scheme. A gift of the fee-simple, therefore, or of the entire interest, subject to an executory limitation which is too remote, takes effect, as though it had been originally limited absolutely, or free from any divesting gift. A limitation of a life-estate, or other partial interest, with a remainder expectant upon it which is void for remoteness, of course, remains *in statu quo prius*; neither receiving enlargement, nor suffering diminution. And the like holds

Remoteness
in limitations
as it affects
prior gifts.

with respect to executory limitations, not operating to divest previous partial estates, but expressed to take effect at some period subsequent to their determination: the limited interest remains as originally created, both as to character and extent, without reference to the manner of the devolution of the property after its expiration. As respects the class of remote limitations which are not preceded by any express gift, either by way of particular-estate, or of an estate or interest to be divested, the effect is, simply, so far as concerns such remote executory limitation, to leave the subject-matter of the gift exactly in the same position, as if no disposition of it had ever been made.

And in those cases, where, if the executory limitation were valid, it would have the effect of controlling or directing the construction of a prior gift, or of raising an estate by implication, it need hardly be observed, the remoteness of such limitation deprives it of all possible influence upon the preceding gift. This observation, however, must be understood with the qualification of its inapplicability to cases within the range of the doctrine of *cy-près*, and also to the case of a gift of successive estates, to a line or class of persons extending to objects too remote, the general scope and intention of which the Courts have sometimes considered themselves at liberty to regard, in order, if possible, to vest in the person first representing the line or class, an estate, commensurate with that intended to be taken by the several members of it in succession, although not of a mode of devolution which will carry it to those persons, in a due order of right, *per formam doni*. The rule in question is, also, clearly inapplicable to the case of limitations of personalty, to take effect on an indefinite failure of issue of a prior taker, which, while they are in themselves too remote, yet, have the effect (as was formerly seen, at length,) of enlarging the interest of the ancestor, where that interest is not itself coextensive with the absolute property.

It must, further, be noticed, that, under the head of limi-

tations anterior to gifts void for remoteness, are to be classed, limitations, in themselves valid, *made subject* to independent trusts or restrictions engrafted upon them which are too remote: *ex. gr.*, trusts for accumulation of income wholly void under the Rule against Perpetuities,—such, in fact, as occurred in the before-cited cases of lord *Southampton v. marquis of Hertford*, and *Marshall v. Holloway*: these remote trusts do not affect the limitations of the *property*, which remain as though none such had ever been declared.

2ndly, The distinctions, with respect to the consequences of remoteness in a limitation, *as to the objects of it*, may be recounted with little of difficulty. The primary rule is, as has been often remarked, that, if the objection of remoteness attaches, according to events at the time of the instrument, by which the limitation is created, taking effect, no events subsequent to that period will enable the donee to take, and he is, consequently, for ever debarred from any benefit under the gift. Another rule, formerly also observed upon, is, that, in the case of a gift to a class of persons *concurrently*, remoteness in some of the objects affects the gift with that objection in respect of all, and the whole, therefore, fails; and this, as in the previous case, without regard to the course of subsequent events; nay, even though *all* the objects actually become capable within the prescribed period. It will be remembered, however, that this rule does not hold, when the shares of the valid objects are separate and capable of being ascertained distinctly from those of the portion of the class which is too remote, and no uncertainty is thrown over the proportionate shares of the former, by reason of the unascertained number of members of the latter. But, with respect to limitations to a class of persons *successively*, it has been seen, that so many of the individual gifts will be valid, as are made in favor of persons who will necessarily take, if at all, within the required limits, and that such as are made to persons, of whom this cannot be predicated, will be too remote. As a consequence of this rule, it will

Remoteness in a limitation, in reference to the objects of it.

occur to the reader's recollection, that, where the series of gifts are limited to a line or class of unascertained persons, as, successors to a title or dignity, the limitation is, generally speaking, void as to all the persons answering the required description subsequent to the first (whether they be *in esse* at the creation of the gifts, or not): but that, in the case of successive limitations to a class of persons, who, though not named or specifically pointed out, must be capable within the proper period, as, for example, successive occupiers of another settled estate, (the settlement of which is, of course, here assumed to be free from objection, on the point of remoteness,) the gifts are valid: as to real estate, for the whole extent of the limitations comprised in the referential trust; and, as to personal estate, to the extent of giving it to the successive tenants for life, and vesting the absolute interest in the first tenant in tail; or, even, of suspending such vesting, until the attainment by the tenant in tail of his age of twenty-one, or his death under that age leaving issue, if the trust provides for the existing limitations being followed, "as far as the rules of law and equity will permit."

Effects of
remoteness in a
limitation upon
posterior gifts.

3dly, The remaining branch of the subject of the consequential operation of the Rule against Perpetuities, is, the effect of remoteness in a gift, *as to subsequent or posterior limitations*. The general rule upon this point is, that all gifts, limited to take effect after or on failure or determination of a prior limitation, which is too remote, are affected by such invalidity, and are, consequently, void for remoteness, likewise. This doctrine holds, too, although the objects of the prior remote gift never come into existence, or their interests never vest, and although, also, the subsequent limitation is made to a person, *in esse* at the time of the creation of the gift, and, therefore, *per se*, capable of taking. (f) This inflexible rule, so far as it respects remainders, results from the consideration, that the law regards limitations made to take

(f) 2 Sugd. Pow. 73. 1 Jarm. Wills, 242.

effect in an order of priority and posteriority, as gifts which are to arise in the order of their limitation, and which, therefore, it must be presumed, in the absence of antecedent proof, will actually so arise. As to limitations which operate to divest preceding gifts, or are limited to take effect in case of the non-existence, or non-vesting of the interests, of the objects of a prior gift carrying the whole interest, the extension of any remoteness in the preceding limitation to that expectant upon it, without reference to the validity of the latter, taken *per se*, rests upon the simple ground, that, operating to defeat, or take effect on failure of, a gift which is too remote, it is necessarily affected by the invalidity which attaches to the prior limitation.

This latter doctrine must not, however, be applied to the case of a general divesting or shifting limitation, extending over a whole series of gifts, one or more of which may happen to be too remote; as the shifting clause has no necessary or immediate connexion with the remote gift or gifts; and it will, therefore, be valid and take effect, on the happening of the specified event, as to such of the limitations as are not too remote.

But the general rule, that gifts postponed to remote limitations are, also, void for remoteness, is subject to one exception: and this is, that, if it be provided, that the event, on which the subsequent limitation is to take effect, shall happen within the period prescribed by law, or, if the event be such, that it must necessarily so happen, if at all, the limitation will arise on the specified event, or, in the former case, on its happening within the prescribed period, notwithstanding the remoteness of the preceding gift. An instance of a limitation of this kind occurred in the case of *Beard v. Westcott*, (g) formerly noticed at length, where, it will be remembered, a testator gave an estate, to his grandson, J. J. B., and his assigns, for the term of ninety-nine years, if he should so long live, and after his decease, to the first son of the body of J. J. B., and his assigns, for the like

If ulterior limitation properly restricted, it is not affected by circumstance of preceding gift being too remote.

term of ninety-nine years, if he should so long live, and, so on, in tail-male, to the issue of such first son lawfully issuing, for ever, and for want and in default of such issue of such first son, then, to the second, &c., sons of J. J. B., in like manner: "and if there should be no issue male of the same J. J. B., nor issue of such issue male at the time of his death, or, in case there should be such issue male at that time, and they should all die, before they should respectively attain the respective ages of twenty-one years, without lawful issue male," then, there were similar limitations to J. B., and his sons, and issue male, with divers gifts-over. The judges of the Court of C. B. certified, on a case from Chancery, that the limitations to J. J. B., and his first son, were valid; that the gift to the issue of such first son was bad, as too remote, and that, therefore, the limitation to the second and other sons of J. J. B., on failure of issue of his first son, were, also, too remote, as being given to take effect generally on the determination of a prior remote gift: but that the limitation in favor of J. B. was valid, and would take effect, in the event of their being no son of J. J. B., nor issue male of any such son living at the death of J. J. B., or, there being such issue male, in the event of their respectively dying under twenty-one without issue male; on the ground, as Sir *Edward Sugden* remarks, (*h*) that the gift-over was to take effect within the compass of twenty-one years after a life in being.

It is clear, however, that, in order to a limitation subsequent to a remote gift being protected by the exception in question, the fact of its being made to take effect within the proper period, irrespectively of the time limited for the preceding gift to arise, must be certain and explicit; for, it is undeniable, the *prima facie* presumption is, that every gift, postponed to a limitation bad as too remote, is, likewise, void for remoteness.

(*h*) Sugd. Gilb. Uses & Tr. 272, n.

CHAPTER XXXII.

OF LIMITATIONS EXEMPT FROM THE OPERATION OF THE
RULE AGAINST PERPETUITIES.

It devolves, to point out certain estates and interests which do not fall within the scope of the reasoning on which the provisions of the Rule against Perpetuities rest.

When, either, from circumstances extrinsic to a limitation, or, from the character of its subject-matter, a sufficient guarantee exists against any violation of the spirit of the laws for prevention of remoteness, their force and applicability, with respect to any such limitation, cease, so far as concerns the necessity for expressly confining it to the period prescribed by law.

This consideration seems to apply to the three following classes of limitations, here proposed to be inquired into; namely,

1st, Limitations, executory or by way of remainder, after or in derogation of estates-tail;

2ndly, Limitations, whose subject-matter is of limited endurance; and,

3rdly, Limitations in mortmain, and to charitable uses.

1st, As to *limitations expectant or engrafted upon estates-tail*. Allusion has been already made, on several occasions, to the rule of law, which exempts limitations after or expectant upon estates-tail previously limited, from the application of the Rule against Perpetuities: but, as this doctrine is of much practical importance, it seems to demand a distinct consideration.

1. Limitations after estates-tail generally not open to objection of remoteness.

It will be remembered, that the origin of the restrictions imposed upon the creation of future interests in property, was, the establishment of the doctrine, that limitations by way of Executory devise and bequest and Springing and Shifting Use, were not barrable or destructible by the owners of prior interests: that exemption originating in the determination, that a common recovery suffered by a tenant in fee-simple was of no force, to operate upon or affect future contingent interests limited out of the fee. (i) Hence arises, then, the important distinction between an estate-tail and a fee-simple, in regard to the destructibility of future executory interests limited after or engrafted upon each. We have before seen, that a common recovery was (till recently) not only the appropriate mode of assurance for a tenant in tail, but that the right to suffer such recovery was so inherent in the estate-tail itself, that the law would not admit of any encroachment upon it, whether in the shape of conditional limitation, proviso, or otherwise. (k) And this rule now holds to an equal extent, with regard to the enrolled assurance substituted in the place of the common recovery. The operation of this recovery was, and that of the enrolled assurance is, so extensive, that no limitation, of whatever character, expectant or engrafted upon the estate-tail, can evade the destruction which awaits it, as a consequence of the acquisition of the fee-simple by the tenant in tail. This destructibility it is, which deprives a limitation after a preceding estate-tail, of all dangerous tendency to a perpetuity, however remote the event on which it is limited to take effect, abstractedly considered.

Nor is it any answer to this reasoning, to say, that the tenant in tail may not avail himself of this his inalienable right to bar the estate-tail and remainders and executory limitations-over, and that, in that case, future interests may arise, without reference to the expiration of the period fixed by the

(i) *Vide supra*, pp. 123—138.

(k) *Vide supra*, pp. 44—48.

Rule for prevention of Perpetuities. True it is, that such a consequence may follow: the estate-tail having endured for a century, without having been subjected to the exercise of the owner's right to destroy it, may eventually be determined, by force of a limitation engrafted upon it, which, taken by itself, would certainly have been too remote, *ab initio*. But something similar may be prædicated of every *fee-simple* estate: it may be transmitted from the first purchaser, through a long line of heirs, without being ever made the subject of a sale, or, even, of a loan transaction; and in such case, it is obvious, that, practically, the result, as far as concerns all but the immediate owners, is in no way different from what would have been experienced, had the property been originally tied up so as to be inalienable for a similar period, and such restriction had been allowable. It is the circumstance of the estate being or not being alienable, discharged from the future executory interests created out of it, that decides the question of the tendency of the latter to a perpetuity: if they are destructible, their existence is no clog upon the free circulation of the property, and there is, consequently, no semblance of a perpetuity, however remote the events on which they depend; if they are not destructible, it is not alone the possibility of their ever taking effect in possession, that induces a transgression of the law of perpetuity, (such interests as are destructible having also that chance, although the events that give them effect be ever so remote,) but, rather, the certainty, that, whatever the transactions which take place with respect to the precedent interest, the executory limitations will arise on the happening of the specified contingencies.

The most frequently-occurring instances of the operation of the rule under consideration are those, afforded both by testamentary dispositions and settlements by deed, in which the estate of the tenant in tail is subjected to a conditional limitation, divesting that estate, in the event of the tenant in tail, or his issue successively entitled under the entail,

Illustration of doctrine, that limitations after estates-tail cannot be too remote.

neglecting or refusing to assume and continuing to use a particular name, or to bear certain arms (generally being those of the testator or settlor); or in the event of certain specified property devolving at any future time, on the tenant in tail, or his issue inheritable to the entail. These are provisions, it will be observed, not of the character of remainders, or limitations of reversionary interests expectant upon the natural determination of the estate-tail, but they possess every essential characteristic of Executory devises and Shifting Uses, under one of which classes they, consequently, rank, according as the instrument by which they are created is, either, a will, or, a deed. Engrafted upon an estate in fee-simple, either of these limitations would be void, unless the events contemplated by each, (the non-user of the name and arms, in the one case, and the devolution of the estate, in the other,) were expressly confined to happen within the period of lives in being and twenty-one years afterwards, or twenty-one years, simply. But, as a recovery or its substitute suffered or executed by the tenant in tail, or his issue, will at any time defeat these conditional limitations, together with all others, of whatever character, limited after or engrafted upon the estate-tail, there is no greater tendency to a perpetuity in them, than, in an ordinary remainder expectant upon the regular determination of the estate-tail, and there is, therefore, no necessity to confine the happening of the specified events, to the allowed period of remoteness. The reverse, was, indeed, the rule generally observed in practice, a century since, but the more settled state of the law of perpetuity of late years, and the better acquaintance with its principles, have long cast the shade of desuetude over this *abundans cautela* of legal draughtsmen.

Rule equally applicable to gifts after future estates-tail to vest within legal period.

And this rule of law is of equal applicability to executory limitations engrafted upon estates-tail which, though not vested at once, will become so, if at all, within the compass of lives in being and twenty-one years beyond; because, immediately that vesting happens, the estate-tail and all the

ulterior limitations are as much in the power of the tenant in tail, as if the entail vested forthwith; and if the tenant in tail has full dominion over the property within the period of time mentioned, all objection to any ulterior limitations on the ground of remoteness, ceases. Indeed, instances of these classes of limitations most frequently occur, in respect to estates-tail, the acquisition of full power over which may, possibly, be postponed, until the lapse of nearly the *maximum* period of perpetuity referred to. *E. G.*, if property be limited (as in the ordinary case of marriage-settlements,) to A., for life, with remainder, to B., his wife, for life, with remainder, to trustees, to support the contingent remainders, with remainder, to the first and other sons of A. and B., successively in tail, with remainders-over; and a proviso be superadded, that, in the event of a particular estate devolving upon the eldest or other son for the time being in possession under the limitations, by virtue of some prior settlement, then the property settled shall go over to the second or other son next entitled in tail under the limitations, as if such first or other son so acquiring the other estate, were dead without issue: here, it may happen, that, by the death of A., leaving B., his wife, *enceinte* with a second son, and by her death soon after the birth of such son, the eldest may not attain his majority, until the expiration of twenty years from the decease of the survivor of the lives in being named; and until he so attains his majority, it is manifest, that he has not the legal capacity to destroy the shifting use, in favor of his younger brother, by barring his estate-tail.

Of course, in such a case, it may happen, that the devolution of the second estate takes place during the infancy of the eldest son, and that, therefore, the shifting use has effect; but it is observable, that it can never have any other operation than such as the eldest son himself (by abstaining from docking his estate-tail,) may give it, except during the very period of time, for which, the rule of law allows

the vesting of the absolute interest in and uncontrolled power over property, to be suspended.

Reference to
doctrine
allowing de-
vices of
reversions
expectant on
estates-tail.

We have before seen, (*l*) that the law allows the devise or settlement of a reversion expectant upon an estate-tail, provided the failure of issue referred to, as the event on which it is to take effect, be a default of such issue only as are inheritable to the existing entail. The legality of the disposition of such reversions takes its rise from the principle at present under consideration; namely, the liability of the reversion, and, consequently, of all estates and interests derived out of it, to destruction by the disentailing assurance of the tenant in tail. Whether a disposition of a reversion, expressed to take effect upon the failure of a more restricted line of issue, than such as are entitled under the subsisting estate-tail, (as, for example, issue male instead of issue generally,) but a failure, nevertheless, too remote in itself, as being indefinite, be valid, has never, to the writer's knowledge, been determined. As it is clear, that such a disposition could not operate to curtail or derogate from the estate-tail, but could only take effect as a contingent executory limitation, to arise in the event of the failure of issue inheritable to the entail, and the failure of the more limited line of issue, being coincident, it may, perhaps, seem, that such a disposition would be protected, as *affecting* the existing reversion, although not strictly capable of operating as a devise or settlement of it. (*m*)

If term of
years precedent
to estate-tail,
but trusts
thereof to arise
on its deter-
mination,
latter void for
remoteness.

It sometimes happens, that, while an estate (as, for instance, a term of years,) is precedent to the estate-tail, and cannot, therefore, be barred or destroyed by any assurance of the tenant in tail, the trusts declared of or upon such estate are ulterior to the estate-tail, that is, are postponed until the failure of issue entitled under the entail. In such a case, as the trusts depend on an estate anterior to the

(*l*) *Vide supra*, p. 253.

(*m*) *Vide supra*, pp. 265, 266.

estate-tail, they cannot be defeated by any act of the tenant in tail, in like manner, as the estate out of which they are to take effect cannot be destroyed by him ; and, being so exempt from the power of the tenant in tail, those trusts are exposed to the full force of the Rule against Perpetuities, which declares them void, as limited to arise upon an indefinite failure of issue. Thus, in a recent case, (n) a testator devised certain estates, to trustees, for a term of five-hundred years, upon the trusts after-mentioned ; and he then devised one of the estates, subject to the term, to A., for life, with remainder, to his first and other sons, successively in tail, remainder, to his daughters in tail, with remainder, to B., and his sons and daughters, in like manner ; and he then devised the other estate, to B., and his sons and daughters, in a similar manner, in tail, with remainder, to A., and his sons and daughters, in like manner ; and the testator declared, that the term of five-hundred years was to be held, in trust (among other purposes) to raise portions for C. and D., payable at twenty-one, and further portions, in case either A. or B. should die without issue, whereby the survivor of them would become entitled to the two estates. The estates having centered in the issue of B., by the death of A. without issue ; Lord *Langdale*, M. R., held, that, as the additional charges were to take effect upon a failure of issue, and, at the same time, could not be barred, the trusts of the term for raising the further portions, were void.

It has been sometimes supposed, that there is one exception to the general rule, which validates executory limitations after or upon a previous estate-tail. And the exception is said to be of this character : that where the executory limitation itself *cannot vest until after* the determination of the estate-tail, supposing such estate naturally to expire, and not to be barred, or, where the limitation is to take effect on a contingency, *possibly* unconnected with the

When executory limitation not connected immediately with determination of estate-tail, it is not protected by rule under consideration.

(n) *Case v. Drosier*, 2 Keen, 764.

determination of the preceding estate-tail, as an event which *may not happen till after* its expiration,—that, in such cases,—the executory limitation must be rejected, as void under the Rule against Perpetuities, notwithstanding its liability to destruction by the tenant in tail (o) Of the former branch of this exception, an instance may be supposed, in the case of a limitation to A., and the heirs of his body, and on default of issue of A., and after the expiration of two years from the time of such failure, to B. Of the latter, an illustration is afforded, by supposing a devise of land, to A., in tail, and as soon as a certain tree is cut down, the land to go over to B., and his heirs. In this latter case, if, after the lapse of a long space of time, A.'s estate-tail be spent, and the tree be still standing, the land must, until the tree is felled, descend to the heir of the testator; the consequence of which would be, that the heir would take a fee-simple, subject to an executory limitation-over, which might possibly not have effect until a very remote period. The argument is, as to both these classes, that an executory limitation after an estate-tail, unconfined as to the time of its taking effect, is only held good, where it is to vest, either, upon the natural expiration of a preceding estate-tail in a particular manner, or, upon the determination of that estate, before its natural expiration, on the happening of a stated event. And, certainly, there seems to be no principle, which demands the extension of the doctrine, exempting limitations after estates-tail from the restrictions of the Rule against Perpetuities, to limitations *extra*, and entirely independent of, the estate-tail, or its determination: the limits of the estate-tail ought properly to be considered, as the only period within or at the expiration of which the executory limitation shall take effect, inasmuch as it is the only period during which it can be barred. Nor is the mere possibility, that, in the case put to illustrate

(o) 1 Jarm. Pow. Dev. 408, 409, n.

the second branch of the exception, the happening of the contingency may precede the actual expiration of the estate-tail, sufficient to connect the limitation depending upon that contingency with the estate-tail, so as to induce the application of the rule under consideration: to satisfy such a requirement, there must be a certainty, that, until the time fixed for the executory limitation to vest, it will be destructible. Thus, it has been well said, (p)—“The material distinction is, that, where the executory devise is *immediately* dependent on the estate-tail, the power of defeating it by a common recovery subsists during the *whole* period that the devise continues in its executory state, so that at no period, unless from the personal incapacity of the tenants in tail, on account of minority, or otherwise, does the executory devise exist in an indestructible state: but, on the other hand, where there is an intermediate period, however short, between the determination of the estate-tail, and the vesting of the executory devise, for that period the executory devise is incapable of being destroyed, and is, therefore, exposed to all the mischiefs of perpetuities.” Mr. *Sanders*, in his *Essay on Uses and Trusts*, (q) has supplied an authority, in some measure applicable to the question under consideration; although it is not expressly cited by him, as establishing any such distinction as that here referred to. The case, (r) which is unreported, and arose in Ireland, is thus stated: an estate having been settled by will to uses in strict settlement, a rent-charge was limited to arise after the failure of issue of a *person not taking any estate in the property settled*: and, upon argument, it was determined, by the Court of B. R., in Ireland, that the limitation of the rent-charge was void, as being too remote. This case certainly affords some countenance to the doctrine; and, on the whole, as the latter seems accordant with principle, it must be con-

(p) 1 Jarm. Pow. Dev. 409, n.

(r) *Hartopp v. lord Carbery*, 1819.

(q) Vol. i, p. 197.

sidered as possessing strong claims to recognition as a rule of law.

Extent to which this doctrine invalidates remote executory limitations after estates-tail.

It seems to be a question, however, whether the consequence of the doctrine be, wholly to invalidate the executory limitations in question, or, only so far as they may be capable of arising after the expiration of the period during which they are destructible, that is, after the determination of the estate-tail. The result of the latter of these hypotheses would be, that the limitation would be valid, and might take effect, in the event of the happening of the contingency prior to the exhaustion of the estate-tail, without any act having been done to bar that estate. And seeing that such interests are destructible by the disentailing assurance of the tenant in tail, (equally with all other executory limitations,) while his estate subsists, (s) there seems to be no sufficient reason for denying validity to them, so far as respects their capability of taking effect at the natural termination of the entail.

Powers, to be exercised with consent of tenant in tail, not void for remoteness, upon same principle as that validating indefinite executory gifts.

The principle, which exempts limitations after an estate-tail from all objection as to remoteness, (as we have formerly seen,) is equally applicable to powers of sale, exchange, partition, enfranchisement, and the like, to be exercised by trustees, with the consent of the tenant for life, or the tenant in tail in possession. These powers, not being exerciseable without the concurrence of the persons beneficially entitled, are manifestly destructible, by any act of the tenant in tail which would defeat remainders and executory limitations; and such destructibility, consequently, removes all tendency to a perpetuity, to which the indefiniteness of the powers might have given rise. The state of the law with respect to powers, to be exercised generally without reference to the consent of beneficial owners, and uncircumscribed in regard to the time of their execution, has been noticed on a previous occasion.

(s) 1 Jarm. Pow. Dev. 409, n.

2. A second class of limitations which, it has been generally supposed, (t) are exempted from the operation of our laws against remoteness, consists of those, the *nature of whose subject-matter* is such as to render it necessary (it is said) for them to take effect, if at all, within the period prescribed by the Rule for prevention of Perpetuities, and which, therefore, in themselves, preclude any question of remoteness.

2. Limitations of interests of confined duration.

Thus, let it be supposed, that A., being tenant under a freehold lease for three lives, devises the property of which he is lessee, after the death of B. without issue, to C. Taking the event, and the limitation expectant upon it, abstractedly, or dissociated from the nature and circumstances of the estate, the former is, unquestionably, too remote, and the latter, therefore, void. But, considering them in reference to or in connexion with the peculiar character of the subject of the gift, the applicability of the same rule seems, at least, doubtful.

The arguments to be urged in favor of this supposed exception have been so luminously stated by Mr. *Butler*, that no apology can be necessary for their insertion in this place, in order to the better comprehension of the subject. "It sometimes happens," writes that learned gentleman, (u) "that executory uses or trusts, limited to take effect at a period which exceeds the boundary of such executory limitations, are created in estates or interests, the extent or duration of which estates or interests does not exceed that boundary, as in leases for three lives, or twenty-one years. In all such ulterior limitations, the nature of the case appears to make it necessary, that the clause introducing them must be understood to be accompanied with a trust or implied condition, that the event on which it is to take effect, shall happen within the term or duration of the estate or interest in which the use or trust is created :

Mr. *Butler's* reasoning on this subject.

(t) See Prior on "Issuc," 103.

(u) Note to F. C. R. 500.

and on this supposition such secondary limitations may be saved. If fee-simple lands are conveyed to A., and his heirs, and if A. shall have no son who shall attain the age of twenty-four years, to B., in fee; or if a monied fund be directed to be held in trust for A., his executors and administrators, and if A. shall have no son who attains the age of twenty-four years, in trust for B.; in each case, the limitation to B. will be void for its remoteness, as in each case, the event on which it is limited to take effect must not necessarily take place, or become incapable of taking place, at the expiration of a life or lives in being and twenty-one years, a requisite, as we have seen, essential to the legal validity of such executory limitations. Now, if a leasehold for three lives be conveyed to A., and his heirs, and if he shall have no son who attains the age of twenty-four years, to B., and his heirs, or if a leasehold for twenty-one years be directed to be held in trust for A., his executors and administrators, and if he shall have no son who attains the age of twenty-four years, in trust for B., his executors, administrators, and assigns, in each case, the limitation to B. may, at first view, appear to be liable to the same objection of remoteness; but, it must be observed, that the lives which, in the first case, and the years which, in the second, form the term for which the property is held, are within the legal boundary. Now, the limitation-over cannot be understood, as meant to have any operation, except on the supposition, that the event on which it depends, will take effect during the continuance of the term. This seems to make it necessary to connect the continuance of the lives or years with the ulterior limitation, so as to incorporate their continuance into and make it a part of the event, on which the ulterior limitation is to arise. If fee-simple lands were limited to A., his heirs and assigns, or a monied fund were limited to A., his executors and administrators, with a limitation-over to B., if, during the lives of three persons in being, or the lives or life of the survivors

or survivor of them, or during the actual term of twenty-one years, no son of A. should attain the age of twenty-four years, there is no doubt, that the limitation-over to B. would be legally valid. Now, the limitation-over in the cases suggested will be the same, if the continuance of the lives or years, for which the land is held, be considered as incorporated into, and making a part of, the event introducing the ulterior limitation, in the manner proposed. The clause introducing that limitation must then be understood, in the same manner, as if it had been thus expressed: 'And in case, during the lives of the three persons for whose lives the lease is held, or during the lives or life of the survivors or survivor of them, (or during the term of twenty-one years, as the case may be,) A. shall die, and no son shall, within that period, attain the age of twenty-four years, then and in that case, the lands shall go and remain to B.' It seems clear, that, in the cases we are speaking of, a limitation-over, introduced in these words, would be free from objection. The question, therefore, is, whether, in the words usually introducing such ulterior limitations, the supposed words must not be implied. The rule of interpretation, *quod necessario subintelligitur non deest*, is certainly in favor of their implication."

These remarks, it is to be observed, are applicable to every species of limitation to which the Rule against Perpetuities extends, and the question discussed in them is one which must be decided alike in regard to all such limitations.

The little authority to be found, bearing upon this subject, seems, until recently, to have been of a conflicting character.

The authorities not uniform upon the point. Detail of these.

Thus, in an old case, (v) where A., possessed of a term of ninety-nine years, determinable upon three lives, devised the lease, to his wife, for life, and after her decease, to N., his son, for life, and if N. should die without issue, then, to B.; it was held, that the limitation to B. was void, for

(v) *Love v. Wyndham*, 1 Vent. 79; 1 Lev. 290.

that the remainder of a term could not depend on a possibility so remote as an indefinite failure of issue. Here, we perceive, a limitation of property held under a lease *for lives*, after a general failure of issue, was deemed equally invalid with a similar limitation of land held in fee-simple; although, perhaps, little importance is to be attached to the decision; as the attention of the Court was not drawn to the distinction under consideration, and the notions prevalent on the general subject of Perpetuity were by no means characterized by preciseness.

The next case (*w*) to be noticed is one in which the question directly arose, and was, to a certain degree, discussed; although, as the case went off on another point, no judicial opinion was pronounced upon it. Lady C., being jointress for life of an estate, demised it to trustees, for ninety-nine years, if she should so long live, in trust for herself, during her widowhood, and after her marriage, then, in trust for J. S. C., her second son, and the heirs of his body, and if he died without issue, then, in trust for L. S. C., her next son: J. S. C. died without issue: and, upon the question, whether the trust of the term should go to his mother, as administratrix to him, or to the next son in remainder, it was contended, that the only reason, why the trust of a term could not be limited to one and the heirs of his body, with remainder-over, was, because this would make a perpetuity, but here would be no perpetuity, in regard that the whole term was to determine whenever lady C. should die, just as if she had made a lease of her jointure-lands, to a trustee, for ninety-nine years, if she should so long live, in trust for A., and the heirs of his body, but if A. should die without heirs of his body, living lady C., then, to B., which limitation had been good. The reporter adds,—“*ideo quære*, though it seems rather to be a good limitation of the trust, and within the reason

(*w*) *King v. Cotton*, 2 P. Wms. 676.

of the duke of *Norfolk's* case; and the several other subsequent resolutions grounded thereupon."

In another case, (x) a testator, being seised of an estate for three lives in the property in question, devised it to his daughter, M. M., for life, remainder, to her issue male, and for want of such, remainder, to L. One of the questions being, whether the remainder to L. was good, it was held, by Lord Chancellor *Talbot*, in the affirmative; his lordship observing, that there could be no danger of a perpetuity; for all these estates would determine on the expiration of the lives of the *cestuis que vies*; and so, likewise, would it have been, had there been twenty lives all spending at the same time. Although, at this day, there is no doubt as to the validity of a limitation of an estate *pur autre vie*, after a prior gift in *quasi-entail*, the reason of the observation just quoted should seem to be applicable to every kind of limitation, to take effect out of such estates; although, it is true, in the former case, there is the additional security against undue remoteness, afforded by the destructibility of the limitation depending on the *quasi-entail*.

In the next case, (y) a testator, *cestui que trust* of an estate for three lives, devised it, subject to various charges, to his daughter, M. S., and made her executrix, then to be equally divided between H. W., and T. W.; and if H. W., or T. W., died without heirs of their respective bodies, then, their respective shares should go to C. C.: T. W. released, for valuable consideration, all his interest in the premises, to H. W., and died without issue. Lord Chancellor *Harcourt* decreed, that C. C. was entitled to the moiety of T. W. On appeal, it was insisted, that the limitation to C. C. ought to be deemed void, both at law and in equity, as tending to a perpetuity, and preventing the estate from being, by any means, aliened; for, though the original estate was only for three lives, yet, it being the

(x) *Low v. Barron*, 3 P. Wms. 262.

(y) *Wustneys v. Chappell*, 1 Bro. Parl. Ca. 457.

mutual interest of landlord and tenant, that such leases should be from time to time renewable, and, being renewed, must continue under the same trusts, the estate might by possibility continue for ever. On the other hand, it was said, that the limitation could only take effect, if the three lives, or any of them, were in existence at the time of the contingency. The decree was affirmed.

In a more recent case, (*z*) the doctrine of *cy-près* (which, it will be remembered, proceeds upon the supposition of the remoteness of an ulterior gift,) was applied to a devise of property held for lives, equally with fee-simple estates passing under the same will. It does not appear from the report, however, that any distinction was taken in the argument, as to the construction to be put upon the limitations of the different estates, on account of some being held for lives only. (*a*)

In a still later case, greater notice was taken of the question as to the remoteness of limitations of property held for lives; and, it may even be said, that an affirmation of the exception under consideration is discoverable. The case alluded to is that of *Bengough v. Edridge*, (*b*) where, it will be remembered, under a will, estates were vested in trustees, for a term of one-hundred-and-twenty years, if twenty-eight persons therein named, or the survivors or survivor of them, should so long live, and for the term of twenty years to commence from the expiration of the prior term, upon trusts for the benefit of a person *in esse*, and after his

(*z*) *Mogg v. Mogg*, 1 Mer. 654.

(*a*) It was stated by Mr. *Preston*, (who was one of the counsel in *Mogg v. Mogg*,) on the argument in the case of *Bengough v. Edridge*, *infra*, that, "in the case of *Mogg v. Mogg*, the Court was of opinion, no perpetuity existed as to leaseholds for years determinable on lives, even though there might be a renewal, and probably would be renewals, under the tenant-right."

The report furnishes no account of this opinion; and it is difficult to conceive, how any such could have been entertained, consistently with the actual decision, which treated estates, of whatever duration, as alike, in regard to the law of Perpetuity. It would seem, that the learned gentleman has been misreported.

(*b*) 1 Sim. 173.

decease, of his several sons, born and unborn, successively, and of the heirs male of such sons respectively, by purchase, with divers limitations-over, in favor of other persons *in esse*, and their sons, and issue, in like manner: subject to these terms, the inheritance of the property was devised in strict settlement. The question of the remoteness of the limitations in the will coming before the Court of Chancery, upon a bill filed by the testator's heir-at-law, (who was also the first tenant for life under the limitations,) for declaration of the rights of the various parties interested, it was argued, that the limitations, to take effect during the period of the suspension of the inheritance, were within the boundary of perpetuity, as they were, in effect, only for a certain number of lives in being, and twenty years after (it being, also, contended, in support of the ulterior gifts of the inheritance, that this additional term might be an absolute one). It was said, on the other hand, that, although it had been stated, as an acknowledged rule of law, that limitations issuing out of limited interests were valid, not even a *dictum* could be produced to establish it; for that limitations were to be judged of, with reference to perpetuity, not by the quantity of the interest out of which they are to issue, but by their legal effect; and that nothing could be more inconvenient, than to hold the same limitations good, in one case, and bad, in another; and that, consequently, the limitations of the terms must be governed by precisely the same rules, as gifts to take effect out of the fee-simple. It was, further, urged, that the terms, supposing them to be valid, were not capable of supporting trusts in themselves illegal: that, as the terms were introduced into the will for no other purpose than to evade the law, they could not support trusts in themselves invalid: and that, though the rule of law was, that no disposition should be good, by which alienation might be suspended for a period longer than a life or lives in being, and twenty-one years after; yet, the converse of that rule was nowhere laid down, that every suspension

during that period is good ; but that whatever tends to a perpetuity, or is within the mischief of it, is, whatever may be the ingenuity with which the particular interest has been framed, a case for the interference of the Court. To these remarks, it was well replied, that the argument, that, even if the limitations in the will could be good, they were an evasion of the law, and a fraud on the rule, was a solecism ; for that it was absurd to say, that there was a rule of law which permitted the suspension of property during a given period, and that it was an evasion of the law to conform to the rule : nothing, which was consistent with the rule, could be a fraud on the rule. The Vice-Chancellor decided in favor of the validity of the limitations, to take effect out of the inheritance, after the determination of the terms ; but it does not appear, that his honor made any observations, directly to the point of the legality of the trusts limited *during* the terms ; thereby tacitly affirming the soundness of the whole of the testator's dispositive scheme, of which, the limitations of the terms formed no insignificant portion.

Decided cases,
on the whole,
favorable to
the doctrine.

The result of these cases, it is conceived, is, upon the whole, favorable to the doctrine under consideration ; unless, indeed, any distinction is to be taken between limitations out of leases for lives, or for years determinable on lives, and trusts of terms created in estates of inheritance, similar to those in *Bengough v. Edridge* ; a distinction, for which, it should seem, no very influential reason is to be assigned.

Opinions of
text-writers on
the subject.

In addition to this support from authority, it may be noticed, that, besides Mr. *Butler*, and Mr. *Peere Williams*, the doctrine has received the assent of other writers on the law of real property, of the first repute. Thus, Mr. *Fearne* (c) seems to be of opinion, that a limitation upon a failure of issue, of an estate held for a term determinable on a life in being, is good ; as appears by his short parenthetical obser-

vation, on quoting the remark of mr. *Peere Williams*, above cited. And mr. *Preston*, (*d*) also, lays it down as a rule, (though, he admits, "not fully and deliberately settled,") that, "if from *the nature* of the property, the interest cannot be too remote, a limitation-over will be good, in whatever words it shall be expressed." The *Real Property Commissioners*, again, (*e*) alluding to the case of *Bengough v. Edridge*, seem to admit the doctrine under consideration, (at least, as respects limited estates of the kind which occurred in that case,) for they remark, that, "although a limitation to the son of an unborn son, if considered by itself, would have been bad, yet, when it came to be taken as covering a portion only of the main period assigned for the suspension of the estate, it was held good; for, as the whole period did not exceed lives in being and twenty-one years afterwards, there was no perpetuity; and, if there was no perpetuity in the whole, there could be none in the part." And, so, also, mr. *Jarman*, (*f*) speaking of a devise, (ordinarily too remote) which, from the nature of the subject of gift, as in the case of a life-estate, can never be extended beyond the period allowed by the rule of law, admits, that "much argument might be advanced in favor of the validity of such a limitation."

Thus supported, the doctrine in question has, perhaps, some claim to consideration, as a principle of law; although the want of authority adequate to the necessities of the case, coupled with the existence of an old decision supporting a different conclusion, and a few theoretical difficulties, not as yet adjudged to be other than insuperable, forbid our treating it as a clear or settled rule.

Of these difficulties, the first (regarding leases, strictly so called,) is that presented by the *tenant-right of renewal*, which is considered to exist in respect to a large portion of property held under leases for lives, or for years deter-

The difficulty presented in the case of leases, by the tenant-right of renewal.

(*d*) 2 Essay on Abst. 162.

(*f*) 1 Pow. Dev. 405, n.

(*e*) 3 Rep. 33.

minable on lives. This *tenant-right* operates, in equity, as a kind of connecting link between every successive lease, or, as it has been better said, (*g*) is the author or moving cause of every fresh lease; and it is, therefore, bound, in equity, by every disposition or settlement of the existing lease, to which it is attached. And where the lessor is bound to renew, the tenant has a right which may be transferred or settled *at law*. As, under such leases, consequently, the tenant has an interest beyond his subsisting term, it deserves consideration, whether the reason of the alleged exception from the rule, that executory limitations must be confined to arise within the legal limits of remoteness, grounded on the limited duration of the subject of the gift, be not, to a considerable extent, if not, entirely, taken away.

Nay, it may, even, be further said, that, whether there be any obligation to renew, or any tenant-right of renewal, or not, if the existing lease be *actually* renewed, all ground for restricting the application of the Rule against Perpetuities is removed, as the new or substituted lease is affected by all the limitations and trusts to which the old lease was subject. Certain it is, that lives, not *in esse* at the date of the settlement or devise of the existing lease, may afterwards be made the *cestuis que vies* of the new lease; and, if such be the case, there seems no reason for supporting a remote limitation of property held under renewable leases, in reference to the question of its tendency to a perpetuity, which will not be found to be equally applicable to similar limitations of lands held in fee-simple.

It must be observed, that mr. *Butler* (*h*) suggests this question of the existence of a tenant-right of renewal, as, possibly, affecting or qualifying his conclusions upon the general subject; while mr. *Preston* (*i*) considers, that the limitation of an estate held for lives, or for years deter-

(*g*) Cov. Conv. Ev. 153.

(*i*) 2 Essay on Abst. 163.

(*h*) Note to F. C. R. 502.

minable on lives, will not, on account of the existence of a right of renewal, or a tenant-right, be too remote, and void, when such a limitation would otherwise be protected by the doctrine, grounded on the limited term or nature of the subject of the gift. The *Real Property Commissioners*, (k) again, observe, in reference to leases for lives, that, "such leases being ordinarily renewable, settlements of them are, in truth, not settlements of a limited interest."

It may deserve consideration, whether the objection, presented by this tenant-right of renewal, to an exemption of leases for lives or for years determinable on lives, from the operation of the Rule against Perpetuities, (supposing the existence of any real objection,) might not be obviated, by holding, that all limitations of such leases, however in themselves remote, are valid, if the contingencies on which they depend, happen during the existence of the *cestuis que vie*; in other words, by confining the protection afforded in the limited nature of the estate, to the time of the actual duration of such estate, and treating the limitations, so far as they affect or take effect out of any renewed lease, in the same manner, as if declared of an estate in fee-simple. Perhaps, however, any suggestion of this kind is rather of legislative, than judicial or professional cognizance. (l)

(k) 3 Rep. 39.

(l) The following are the observations of a writer who assails Mr. Butler's position and arguments, quoted, *supra*, p. 673, *et seq.*, in especial reference to the objection arising from the renewable character of the leases here brought under notice. "It appears to me," observes Mr. Randell, in his *Essay on the law of Perpetuity*, (p. 157,) "that, to consider the present lives as the boundary of the tenant's estate and interest, in an estate *pur autre vie*, is a delusion. A Court of equity will not permit us so to consider it.

"We must understand the limita-

tions, in the foregoing extract from the note to *Fearne*, as intended to operate by way of trust or use, since, otherwise, the limitation to B. and his heirs would be *ab initio* void. Now, where an estate *pur autre vie* is limited to one in trust, the doctrine of equity is, that the trustee is bound to renew, and by renewing, the estate so revived by the introduction of new lives, is subject to the trusts of the old or former estate; the consequence is, that, instead of its being necessary to connect the continuance of the lives with the limitations, so as to make the existence of the *particular* lives a part of the event on which such limita-

How far ques-
tion affected by
general
similarity of
construction of

Another difficulty which may seem to present itself, in the way of the conclusion, that estates *pur autre vie*, and leaseholds for twenty-one years, are not within the principle of

tions are to arise, the existing lives form no boundary to the effectual operation of such limitations. If, therefore, the estate were limited in trust for A., for life, remainder to his first and other sons at twenty-one, remainder to B., and his heirs; and all the lives were to drop during the existence of A., or during the minority of his issue, and the trustees were to renew, such renewed lease would be subject to the trusts and limitations of the old; and if the issue of A. were to die without doing any act to defeat the remainder, such limitation might take effect in the renewed lease.

"But, suppose the limitation to give A. a vested determinable fee; thus, in trust for A. and his heirs, and if he shall have no son who shall attain the age of twenty-one years, then for B. and his heirs. There can be no objection, in point of perpetuity, to such a limitation. Does any objection arise out of the nature or quality of the property? Is not the renewed estate considered as a continuation or extension of the old? As the old estate still in being; as a graft on the old; as a part of the ancient interest? Can it be contended, that A. has the absolute power of disposition, in the same manner, as though the limitation had been to him and the heirs or issue of his body?

"It is unquestionable, that if the limitation to A. had given him a *quasi-estate-tail*, instead of a determinable fee, he would have had the power to bar or destroy the ulterior limitation, even without the concurrence of the trustees: and, therefore, any ulterior limitation, although not referring in the

slightest degree to the rule against perpetuity would be good. But if the limitation had been in a will, so as to cause it to operate after the manner of an Executory devise, it would be secure against the disposition of A.; and as a limitation of this nature, in a deed, is similar to what an executory devise is in a will, it appears, that the limitation to B. would not be in the hands, or absolute power of A. In corroboration hereof, I may be permitted to observe, that by putting the case, Mr. *Butler* seems to admit the validity of the limitation, exclusive of the effect the rule against perpetuity might be supposed to have on that to B., as it stands in the note to *Fearne*.

"Presuming, therefore, upon the validity of the limitation to B. and his heirs, in the case suggested herein, and that A. has not the absolute power over it; the consequence of the trust is, as above stated, that were the trustee to renew, the estate would still be liable to the old trust to B. And that being once established, it is clear, that a trust seeking to postpone the vesting of an ulterior limitation, which the first taker cannot destroy, until the determination of an event, which may not take effect earlier than twenty-four years from a life in being, is void.

"But, suppose the trustee, before renewal, to convey the legal estate to A., and he, being so possessed of the legal estate, were to renew, and then to convey the premises to C. and his heirs; and afterwards to die having no son who attained the age of twenty-four years; could B. or his heirs, standing in the situation of parties, claiming under a limitation admitted

the laws against remoteness, arises from the reflection, that, in all ordinary cases of construction, limitations of these estates are held to operate in a manner strictly analogous to the like limitations of fee-simple estates ; whence, it seems to follow, that, for all practical purposes, the difference in the nature of the two estates is not to be regarded. This argument was well put by Sir *Edward Sugden*, at the bar, on the discussion of the above-noticed case of *Ben-gough v. Edridge* (m):—"Suppose an estate held for lives were granted to A. and the heirs of his body, and, for want of such issue, to B. and the heirs of his body; could it be contended, that the words, 'for want of such issue,' ought to be confined to a failure of issue during the lives, and that, therefore, A. did not take a *quasi-estate-tail*? No; but, in strict analogy to the effect given to the same limitation out of a fee-simple estate, it would be held to give A. a *quasi-estate-tail*. So, if a term of ninety-nine years, determinable on the dropping of a life, is granted to a person and the heirs of his body, the grantee takes the entire

gifts of fee-simple estates, and of estates *pur autre vie*.

to be illegal, be heard in a Court of equity, to charge the trustees with a breach of trust, or the estate in the hands of C.? Upon this question, I do not feel myself called upon to say any thing, and would certainly wish to be silent.

"Still it may said, that the foregoing instances are where the estate was conveyed to trustees, and that it is only in the case of a trust, or of persons who fill the character of trustees, that a Court of equity will interpose, and fix the renewed lease with the old limitations ; and that, therefore, where such an estate is *devised* to A. and his heirs, and if he shall have no son who shall live to attain the age of twenty-four years, to B. and his heirs, such limitation to B. is good, because it must take effect, if at all, during the then existing lives ; or, in other

words, because the Court of Chancery will not fetter the renewed lease with the executory limitation to B.

"Certainly, with one exception, all the cases I have found, and which I believe are to be found in the books, where the renewed lease has been subjected to the limitations of the old, are of a renewal by mortgage, executor, trustee, guardian, tenant for life, and one who has only a partial interest. But I misconstrue a late case, (*Hardman v. Johnson*, 3 Mer. 347,) if it does not go a great way towards determining, that the Court would fix the renewed lease, in the case last suggested, with the ulterior executory limitation ; and, if so, it follows, that such limitation must be bounded by a reference to the rule against perpetuity."

(m) 1 Sim. 225.

interest, for this reason, because the same limitation, out of an estate in fee-simple, would have given an estate-tail; and, therefore, the law, as it does not allow of such an estate in a chattel, would give an interest, as nearly as possible to the same extent, for the sake of effectuating the intention. Consequently, the limitations, out of these terms," (meaning the limitations in the case under discussion) "must be governed by precisely the same rules, as limitations out of the fee-simple are; and, therefore, they are void." This reasoning would be irresistible, were it not for the important consideration, that questions of remoteness are *sui generis*, and not capable of being assimilated to ordinary cases of construction, and that their very peculiarity, is that which meets and answers to the distinction, between estates held for lives or for a limited term of years, and estates in fee-simple. Time and duration are the elements which enter into a question of remoteness, and they constitute, also, the essential ingredients in the difference between the two classes of estates referred to. It may well enough be conceived, therefore, that a similarity in the ordinary rules of construction should obtain, while, at the same time, there might be a marked distinction, in respect to the applicability of the Rule against Perpetuities, arising from the circumstance of the nature and duration of one of the estates not admitting of any real violation of that Rule, whatever the character of any particular limitation or series of limitations, abstractedly considered.

No settled
rule yet arrived
at.

Upon the whole, we may observe, that, although this subject is not one so clear, as to be closed against all doubt and controversy, the weight of authority and argument greatly preponderates in favor of the exemption of limitations of life and other partial interests from the restrictions of the perpetuity-rule; and, if only a valid distinction could be maintained, between terms and interests (not exceeding the allowed period) expressly limited as part of a general scheme of settlement, and renewable leases for lives

or years determinable with lives, it might be laid down, that, in regard to the former, no reasonable question could be entertained, as to the validity of the limitations taking effect out of them.

It is almost superfluous to remark, that the supposed rule of exemption, which we have been here considering, has no application whatever to terms for years, not determinable on lives, of longer (unexpired) duration than twenty-one years; because, though the term be only one of twenty-one years and ten days, as it is not circumscribed by the life or lives of any person or persons in existence, it is not confined within the boundary of perpetuity; and, therefore, limitations of it must be observant of the same restrictive laws, as are imposed on the creation of future interests in property held in fee-simple.

Terms not determinable with lives, not within scope of the doctrine, if for more than twenty-one years.

3. The third class of limitations which calls for attention, in connexion with the exceptions from the Rule against Perpetuities, is that technically termed, *alienations in mortmain*, and to *charitable uses*.

3. Alienation in mortmain.

Alienation in mortmain, *in mortuâ manu*, in its primary signification, is an alienation of lands or tenements, to any corporation, sole or aggregate, ecclesiastical or temporal (*n*); the consequence of which, in former times, was, that, by allowing lands to become vested in objects endued with perpetuity of duration, the lords were deprived of escheats, and other feudal profits, (*o*) and the general policy of the Common law, which favored the free circulation of property, was frustrated; although, it is true, that, at the Common law, the power of purchasing lands was an incident to every corporation. (*p*)

Against such alienations, therefore, the efforts of the English legislature have been, from a very early period, more or less effectively, directed; *Magna Charta* itself containing an express prohibition, disallowing the "giving

Always discouraged.

(*n*) 2 Bl. Com. 268.

(*o*) 1 Jarm. Wills, 58.

(*p*) Shelf. Mortm. and Char. Uses, 27.

lands to religious houses;" under which term, most of the corporate bodies were then comprehended.

Allowed under
license from
the Crown.

It may suffice here to observe, that it is now absolutely impossible for any corporation, spiritual or secular, (with some special exceptions allowed by the legislature, and hereafter noticed,) to acquire (either by purchase or gift) real property of any description, without, either, a general license from the Crown, enabling it to hold lands in mortmain, or, a special license, in reference to any particular acquisition. All corporations, therefore, now possessing such property, (except in the case of spiritual corporations at the Common law, such as, bishops, parsons, &c.,) either were, on their original creation, empowered to hold in mortmain, or, have since obtained such a power from the Crown. And, accordingly, in the present day, many of the new corporate bodies, which are from time to time created, are expressly enabled, by their act of incorporation, or by charter, to take and hold, to them and their successors, lands, tenements, and hereditaments.

Tendency of
such aliena-
tions to create
a perpetuity.

Where bodies corporate thus hold lands in mortmain, there is, clearly, to all intents and purposes, a settlement in perpetuity of such lands, since it seldom happens, that corporations are led to make, or, with fidelity to the corporate interests, can make, absolute dispositions of their realty; and, as regards *ecclesiastical* and *eleemosynary* corporations, (as bishops, rectors, masters of hospitals, &c.,) there is an absolute *incapacity* on their part, so to do; at least, without consents, which, it is either not the interest or the duty of the parties with whom they rest, to grant. And, accordingly, as it has been well observed, (g) "the laws now in force, prohibiting corporations from holding lands, without license in mortmain, are founded upon the same policy as the Rule against Perpetuities—to prevent lands from being withdrawn from commerce and rendered unalienable."

(g) Shelf. Mortm. and Char. Uses, 2.

But, the term, mortmain, as its derivation signifies, is not necessarily confined to the landed possessions of corporations; it equally applies to all property, that, from the nature of the purposes to which it is devoted, or the character of the ownership to which it is subjected, is, for every practical purpose, in a dead or unserviceable hand. (r) This, it is obvious, is the characteristic of alienations to *charitable uses*: it is in the very nature of such dispositions, to withdraw the subject of them from every kind of circulation, since a contrary course defeats their manifest object, *viz.*, the sustentation of the charitable or religious institutions, or the carrying out in continuity of the benevolent purposes and designs, in favor of which they are made. Any disposition incompatible with this chief end is a breach of duty, on the part of the person or body entrusted with the office of giving it effect, and, as such, is relieved against by our Courts of equity. Land thus dedicated to the service of charity and religion is, therefore, practically inalienable.

Alienation to charitable uses, of a similar character.

Upon alienations of this kind, little restraint was imposed until the reign of George the Second. At that period, as Sir *William Blackstone* remarks, (s) it was apprehended, that persons on their death-beds might make large and improvident dispositions, even for these good purposes, and defeat the political ends of the statutes of mortmain; and, in the apt words of Mr. *Jarman*, (t) it appears to have been considered, that this disposition would be sufficiently counteracted, by preventing persons from aliening more of their lands than they chose to part with in their lifetime; the supposition evidently being, that men were in little danger of being perniciously generous at the sacrifice of their own personal enjoyment, and when uninfluenced by the near prospect of death.

Necessity for restraint upon such alienations.

The result of these considerations, therefore, was the This effected

(r) Burt. Elem. Comp. 78.

(t) 1 Treat. Wills, 198.

(s) 2 Bl. Com. 273.

by 9 Geo. 2,
c. 36.

statute 9 Geo. 2, c. 36, commonly, though erroneously, (u) called the mortmain act, which, rejecting surplusage, enacted as follows:—"No manors, lands, &c., nor any sum of money to be laid out in the purchase of lands, shall be given or settled to or upon any person or persons, bodies politic, or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered in trust or for the benefit of any charitable uses whatsoever, unless such gift or settlement be made by deed indented, sealed and delivered in the presence of two or more credible witnesses, twelve calendar months, at least, before the death of the donor or grantor, and be enrolled in the Court of Chancery, within six calendar months after the execution thereof, and unless stocks in the public funds be transferred six calendar months before the death of the donor or grantor, and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, or limitation, for the benefit of the donor or grantor; *proviso*, that nothing shall extend or be construed to extend to any purchaser of any estate or interest in lands, or any transfer of any stock, to be made *bond fide* for a valuable consideration actually paid before the making such conveyance or transfer, without fraud or collusion." The act then provided, that all grants, settlements, &c., to or in trust for any charitable uses, made in any other manner than thereby directed, should be void; except when so made in favor of either of the two universities, or any of the colleges therein, or the colleges of Eton, Winchester, and Westminster: and that the act should not extend to the grant or settlement of any estate within Scotland.

It will be observed, therefore, that this act wholly precludes all *testamentary* charitable provisions, out of real estate or chattels savouring of the realty, and *imposes re-*

(*) See Shelf. Mortm. and Char. Uses, 21.

strictions on like provisions by instruments *inter vivos*. By this statute it is, that all charitable dispositions are now regulated and governed.

In carrying out and putting a construction upon this enactment of the legislature, the judges have given the widest possible scope to its operation, and have been even astute to discover arguments, whereby cases seemingly *extra* both the letter and spirit of the statute might be brought within it. "Never," says a learned writer, (v) "was the spirit of any legislative enactment more vigorously and zealously seconded by the judicature, than the statute of the 9th of George the 2nd."

Spirit of this enactment aided by the judicature.

It would be impossible, within any reasonable space, to present an intelligible view of the various distinctions that constitute the superstructure of which this enactment forms the basis; nor would any such endeavour, if made, be more germane to the subject of this Treatise, than unnecessary, as a vain attempt to discover novelty in regions already well trodden and explored by travellers of observation, industry, and research. (w)

The mortmain act does not extend to Ireland; nor is there any other act, either of the Irish or united legislature, of a similar character, applicable to that part of the kingdom. The British colonies, also, are not embraced by the provisions of the statute; and none of them appear to have any peculiar law of their own for restricting or regulating dispositions in *pious usus*. In fact, as Sir *William Grant* has forcibly observed, (x) "in its causes, its objects, its provisions, its qualifications, and its exceptions, it is a law wholly English, calculated for purposes of local policy, complicated with local establishments, and incapable, without great incon-

It is confined to England.

(v) 1 Jarm. Wills, 211.

—219; Highmore on Mortmain.

(w) See Mr. *Shelford's* elaborate Treatise on the law of Mortmain and Charitable Uses; 1 Jarm. Wills, 192

(x) In *Attorney-General v. Stewart*, 2 Mer. 164.

gruity in the effect, of being transferred, as it stands, into the code of any other country."

Questionable
character of its
present policy.

Whether, indeed, the operation of this stringent law be now of a beneficial character, may admit of grave question ; and the expediency or even necessity of frequent exemptions from its operation, has been expressly admitted by the legislature, on a variety of occasions, when it has passed enactments, (presently alluded to) in favor of charitable and religious projects, to the reasonable success of each and all of which, a *pro tanto* inroad upon the integrity of the mortmain act, has been by it deemed auxiliary, if not, indispensable. Upon this subject, the writer ventures to express his humble but cordial concurrence in the just, enlarged, generous, and humane observations of the author of the *Treatise on Wills*, (y) in reference to the present policy of the statute of mortmain. But, into this question, it does not appertain to our present purpose, further to enter.

Charitable
uses, what.

Charitable uses are of almost infinite variety, as well upon antecedent presumption, as by legal adjudication. The preamble to a statute in the reign of Elizabeth, (43 Eliz. c. 4,) passed for remedying abuses in the administration of charity-estates and funds, mentions the following, as among the charitable objects which were then recognised:—"For relief of aged, impotent, and poor people ; for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities ; for repair of bridges, ports, havens, causeways, churches, sea-banks, and highways ; for education and preferment of orphans ; for relief, stock, and maintenance of houses of correction ; for marriages of poor maids ; for supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed ; for relief or redemption of prisoners or captives ; and for aid or ease of any poor inhabitants, concerning payment of

(y) Vol. i. pp. 211, 212, 213, n.

fifteens, setting out of soldiers, and other taxes." To this copious list, a learned writer's researches (z) have added the following enumeration:—"Gifts for the erection of water-works for the use of the inhabitants of a town, or to be applied to the 'good' of a place, or for the general improvement of a town, or for the establishment of a life-boat, or of a botanical garden, to the trustees and for the benefit of the British Museum, to the widows and orphans or the poor inhabitants of a parish, (which is held to apply to those not receiving parochial relief,) or to the churchwardens in aid of the poor's rate, or the widows and children of seamen belonging to a port, and gifts for the promotion of religion, in whatever terms expressed." These, of course, afford instances only, capable of being indefinitely extended, of the various forms and features which charitable dispositions may be made to assume;—a variety, indeed, whose extent owns no other limits than such as alike bind (not alone the sober and chastened indulgence of a benevolent inclination, but likewise,) the dictates of fancy or caprice, or the wanderings (it may be) of a feverish imagination: and how great the latitude to be allowed to *these*, it were unnecessary to detain the reader with inquiring.

But, content with thus bestowing a transient notice on some of the various kinds of charitable dispositions, of which instances are afforded in our judicial records, it will be proper to proceed to consider more particularly, one species of limitations, (and that, of late, not an uncommon one,) which has been, sometimes, and, indeed, the writer believes, generally, supposed to take rank under the doctrine of charitable uses; but, concerning whose connexion with that doctrine, serious questions seem to arise; and which, therefore, in the alternative of their dissociation from it, appear exposed to the objection of operating an infringement on the laws against remoteness.

(z) See 1 Jarm. Wills, 192. And see Shelf. Char. Uses, 58—82.

Of settlements
of advowsons,
in trust to
present incum-
bents, as
vacancies
occur, such
incumbents
being selected
by the trustees,
or appointed
by parishioners.

: The dispositions alluded to occur, where advowsons or perpetual rights of presentation are vested in a number of persons, in trust, from time to time, as vacancies occur, to present to the cures, such spiritual persons as shall, either, be elected by the trustees, according to some standard of qualification (in point of doctrinal belief) fixed by the deed, or at their own discretion, or, as shall be appointed by the inhabitants of the parishes in question. To these trusts, are usually added provisions for securing a regular and constant succession of a body of persons to carry out the intentions of the settlor; and, when the object is, the appointment of clerks of a particular school of theology, or, even, (it may be) merely of such as are zealously attached to the doctrines and constitution of the Church, regulations are prescribed, securing a similar conformity of opinion on the part of the individuals in whom the patronage is vested. Another feature occasionally assumed by these trusts, is that of their being declared of advowsons *directed to be purchased* with funds provided or bequeathed for the purpose, and which, when purchased, are to be conveyed to the persons and for the purposes prescribed.

By these pro-
visions, advow-
sons perpetu-
ally locked up.

Now, the first observation which occurs with respect to a provision of this kind, is, that, by virtue of it, a *settlement in perpetuity* of the advowson is effected. A disposition for money or otherwise by the trustees at any time would be a breach of trust. (a) The advowson is, therefore, supposing these trusts good, for ever locked up; or its transfer, discharged of the obligations of the trust, absolutely precluded. Such provisions, consequently, (unless with any recognised class of exemptions,) on the first view, contravene the laws against perpetuity; for (as we shall presently see) there can be little doubt, that advowsons are a species of property, the disposal of which must be observant of those laws.

Whether good

Are these settlements, then, embraced by the exception.

(a) See *Foley v. Attorney-General*, 7 Bro. Parl. Ca. 249.

from the Rule against Perpetuities, in favor of charitable uses? Are they, in any sense of the term, dispositions *in pios usus*? as gifts to charitable uses.

And, here, it may be remarked, there can be no question, that advowsons may properly be made the subject of charitable gifts. (aa) Their susceptibility of transfers for such purposes has often been judicially recognised; although, as we shall presently have occasion to observe, the Courts have established a rule relative to charitable dispositions of advowsons, which has an important bearing upon the question under consideration. Advowsons may be limited in pios usus.

To arrive at a proper conclusion upon the question of the charitable character of the dispositions under consideration, it is necessary, accurately to define the nature of that incorporeal hereditament denominated an advowson. The property in such an hereditament consists only in the right to present a duly-qualified clerk to the bishop, on every vacancy in the cure, by death, cession, deprivation, or otherwise. That right is, at the same time, a duty, for the due and punctual discharge of which, the ecclesiastical polity and municipal laws of the kingdom have provided, by vesting in the ecclesiastical head of the diocese, a right of presentation or collation by lapse, at the expiration of a limited period; and, again, in *his* spiritual superior, at the end of a further period; and, ultimately, in the sovereign, as the temporal head of the Church. The inhabitants of every parish, therefore, are legally entitled to be at all times supplied with a spiritual overseer; and, of this right, the correlative is, a *duty* or *trust* on the part of the patron, whether layman, bishop, archbishop, or the Crown. (b) Nature of property in advowsons considered.

It follows, that performance of this duty, or satisfaction of this trust, can, in no case, be a *charitable* act, either as Trusts in question not sustainable as

(aa) See *Attorney-General v. Ward*, 7 Law Journ. Chang. 115.

(b) "A trust, a right, a patronage, for benefit of the parish," per Lord Hardwicke, 1 Ves. sr. 415. "Ad-

vowson is a trust and duty, as well as a right of presentation to the benefice," per Lord Eldon, 10 Ves. 338; and see, for similar sentiments, 2 Russ. 109; and also Burt. Elem. Comp. 413, 414.

gifts to
charitable
uses.

regards the parish, the Church, or the Priesthood; and provision for the regular appointment or supply of the *personæ impersonales* cannot, consequently, be a disposition or settlement *in pios usus*. The essence of charity is voluntariness and benevolence; and these are wholly incompatible with legal restraint or obligation. The provisions under consideration give or secure nothing beyond that which the professed objects of them (the parishioners) are already entitled to by law; and it is impossible, therefore, to declare them charitable. In fact, these trusts are not charitable, because they merely provide for the *exercise of that right which constitutes the subject-matter of the disposition*.

Nor analogous
to any of the
charitable
objects
specified in
43 Eliz.

And this point seems no less certain, with reference to the particular terms of the 43 Eliz. c. 4, than to the abstract nature of charity. It is, clearly, vain, to attempt the support of the settlements in question, as gifts for the good of the Church in the parishes embraced by them, inasmuch as no benefit thereby accrues to such parishes, of which, in default of them, they would be deprived. It is true, it has been laid down, (*bb*) that the grant of an advowson, "upon condition that, so often as the church shall be void, a poor scholar of a particular college shall be preferred," is a charitable gift; but such a disposition is charitable, not on account of its providing for the supply of ministers to the void church, but as a trust for the benefit of poor or ill-beneficed clergy; in which light, it is clearly sustainable, as analogous to many of the charitable gifts specified in the 43 Eliz.

But, in addition to all this, the point seems plain, upon the simple consideration, that, in these cases, there is no *property* to be disposed of *in pios usus*; and if there be no property, it is impossible to say, there can be any charitable gift.

In support of the conclusion from these sentiments, are to be adduced the opinions of several eminent judges.

(*bb*) Duke Char. Uses, 137.

In the case of *Attorney-General v. Parker*, (c) the impropriate rectory of C. had been vested in trustees, for the use and benefit of the parishioners and inhabitants, for ever: there was also a perpetual curacy, with a pension of 4*l.* a year, which had been formerly chargeable (together with the duty of appointing a curate) upon the owners of the rectory. An election of a minister by the parishioners having taken place, an information was brought by the Attorney-General, (at the relation, doubtless, of some one or more of the parishioners,) for the purpose of setting aside the election, on the ground of certain alleged irregularities, and also of providing for the general right of election. Lord *Hardwicke* having disposed of the objections raised to the election, proceeded to observe as follows:—"As to the question, *whether the court ought not to make a decree to settle the right, for that, being a charitable use, the information should not be dismissed*: the general rule is so, but does not hold here; for *nothing is a chargeable use here, but the pension, which is not in question.*"

Opinions of
Lords *Hard-
wicke* and
Eldon agree-
able to this
conclusion.

In the case of *Attorney-General v. Forster*, (d) another information was filed by the Attorney-General, at the relation of several parishioners of the same parish of C., for the purpose of having an election then recently had of the defendant, as curate of the parish, declared void, on the ground of certain alleged irregularities in the admission of persons to vote in the election; and also praying an injunction against the licensing of the defendant. In the course of his judgment on the motion for the injunction (which was refused), Lord Chancellor *Eldon* thus referred to the decision in *Attorney-General v. Parker*, and the grounds of it:—"Lord *Hardwicke*, not according to his usage to put down the short principle that governed him, has said only, that he dismissed the information with costs. But the passages, appearing to be his notes of the argument,

(c) 1 Ves. sr. 43; 3 Atk. 576.

(d) 10 Ves. 335.

show his opinion, that it was difficult, if not, *impossible*, to hold, that the information was a *due proceeding*; for he thought, the only object of an information by the Attorney-General was, to secure the revenue of the curate, who was to do the duty, *viz.*, the stipend between 3*l*. and 4*l*.; and as to the nomination by the trustees to the bishop, &c., *it was all a private suit*: as if there had been trustees of an advowson or any other preferment: the *cestuis que trust* calling upon them to exercise the legal right in them, according to the trust: and I doubt, whether the information was not dismissed upon that principle, as much as upon any other; when it was found, that the election could not be disturbed."

At a subsequent period, the cause came on to be heard under the name of *Attorney-General v. Newcombe*, (e) when Lord Eldon pressed upon the counsel, the objection, (noticed by him on the previous occasion,) that the *Attorney-General could not maintain the information*. It was contended for the relators, that this might be considered in the nature of a charity, and, therefore, the subject of an information, as a provision securing to the parishioners the benefits of religion, and providing for the selection of the most proper person to do the duty of minister of the parish. On the other hand, it was said, that the effect of the original transaction was, an agreement by a number of private individuals, to purchase the living, and thereby to gain a right of nomination to the perpetual curacy: that no distinction as to the jurisdiction could arise from the number of individuals becoming proprietors of the living: and that, if the Attorney-General might interpose, he would have the same right, supposing the number to be five or even two, in the case of a dispute between them. Lord Eldon said:—"When it shall have been ascertained, who are the persons described in this deed as parishioners and inhabitants, in whose persons is constituted the cha-

(e) 14 Ves. 1.

acter of *cestuis que trust* entitled to the beneficial interest, by nominating the curates, those persons, like other *cestuis que trust*, have the right to call on the trustees in this Court; and it is *merely the ordinary case* of a *cestuis que trust* of an advowson calling upon a trustee to present upon his nomination. The curate, when nominated, is entitled to the stipend; and Lord *Hardwicke's* opinion is clear, that, as far as the title to that liquidated stipend is in question, it is in the nature of a charity; with regard to which, there is a right in the Attorney-General to sue. There is an intimation in *Vesey*, and the fact is unquestionable, upon Lord *Hardwicke's* note, that his lordship *had considerable doubt*, whether, regarding the parishioners and inhabitants, whoever answer that description, as *cestuis que trust* of this rectory, having the right to nominate the curate, that is a *title so much in the nature of a charity*, that the party would have a right to sue in the name of the Attorney-General." Again, — "What Lord *Hardwicke* would have done, if he had thought that election invalid, I know not: but he has left evidence, that he had *very considerable doubt*, whether he could have dealt with the question, as to the right of election, *upon the ground of the information*; and I think, there may be found in many cases, reason to conclude, that Lord *Hardwicke* would have hesitated long, before he would have executed this as a charity." His lordship then proceeded to consider the case, upon the footing, either, of a private right, or, of a public charity, and dismissed the information with costs.

In the recent case of *Attorney-General v. Cuming*, (f) the advowson of the vicarage of another parish of C. had been vested in trustees, in trust, from time to time, to present such clerk to the vicarage, as the parishioners and the trustees should elect: new trustees were appointed, as occasion, and the terms of the original trust-deed, required:

And, apparently, also, that of Sir J. L. K. Bruce, V. C.

(f) 2 You. and Coll., N. C. C., 139.

and an election of a clerk having recently taken place, an information was filed, at the relation of the person elected, and two of the parishioners, against an unsuccessful candidate, the trustees, and the bishop; praying, that the election might be declared valid, and that the trustees might be ordered to present, and the bishop to induct, and that the bishop might be restrained by injunction from instituting the clerical defendant. The injunction having been granted, and a motion to dissolve it refused, it was objected, in the argument on the hearing, that an information was not the proper mode of proceeding; and Sir *J. L. Knight Bruce*, V. C., thus observed, as to this point:—"A doubt at least was suggested during the argument, and had before occurred to my own mind, whether this was a proper case for an information. It is, however, an information and bill. The information and bill are severable; and supposing it to be a case, in which the Court ought to act either upon information and bill, or upon information or bill, there could be no substantial difficulty in dealing with the record, on account, as I have said, of the severable nature of its two portions." "It is not necessary, therefore, to express any opinion, whether this is or is not a proper case for an information and bill." The doubt here expressed by his honor, doubtless, had reference to the point, to which the above-quoted observations of Lord *Eldon* were directed.

Uncertain
testimony of
other autho-
rities.

Notwithstanding, however, the unfavorable character of judicial sentiments in reference to the charitable nature of the trusts in question, cases are to be found in our reports, nearly similar, in which, points connected with their regulation, or with the election of ministers in pursuance of them, have presented themselves to the Courts, and in which, the mode of proceeding has been an information by the Attorney-General for the time being, or an information and bill, and in which, at the same time, no objection was taken, judicially or otherwise, to the correctness of the

course. (g) On the other hand, authorities are to be found, where questions, exactly the same, have been decided in private suits, without any hesitation as to the necessity for the concurrence of the officer of the Crown; (h) and in one case, an objection raised, on the ground of the non-concurrence of the Attorney-General, was expressly over-ruled. (i) Now, although it is true, that the joinder of the representative of the Crown, in the former cases, proceeded on the supposition, that the subject, in behalf of which the relief and interference of the Court was sought, was a charity, (k) yet, as a bill is generally united with the information, the decision upon such a mode of proceeding, did not necessarily assume the propriety of the interference on the part of the officer of the *parens patriæ*; while the adjudication of questions connected with the settlements under consideration, in the latter of the classes of cases above-alluded to, in the absence of the Attorney-General, and without any objection being raised upon that ground, obviously pre-supposed the validity of such proceedings, without the concurrence of the representative of the Crown.

The result, therefore, of investigation of judicial records upon this subject, is, unquestionably, confirmatory of the conclusions to which we were led upon theory and principle.

But general result decidedly unfavorable to charitable character of these trusts.

Before dismissing this part of the subject, it may be observed, that, when advowsons are ordinarily made the subject of charitable dispositions, our Courts of equity require the trustees to make such profit of the right of presentation (for the benefit of the charity) as is permitted by law. (l) This rule is, obviously, indicative of a general notion as to the proper character of charitable trusts, in no

(g) *Attorney-General v. Scott*, 1 Ves. sr. 413. *Attorney-General v. Rutter*, 2 Russ. 101, n.

(h) *Fearon v. Webb*, 14 Ves. 13. *Edenborough v. Archbishop of Canterbury*, 2 Russ. 93.

(i) 14 Ves. 19.

(k) Judgment in *Attorney-General v. Braton*, 2 Ves. sr. 426.

(l) See Shelf. Mortm. and Char. Uses, 716.

way favorable to the including therein the provisions in question, inasmuch as, from the nature of the case, any such rule is wholly inapplicable to them.

Notwithstanding the utter want of any solid ground for construing the trusts under consideration as charitable, the writer believes, that such an opinion is entertained among some practitioners, inasmuch as deeds creating those trusts have, under advice, been sometimes executed, with the formalities prescribed by the statute, 9 Geo. 2, c. 36. Probably, however, the recommendation of this course has proceeded from that supererogatory caution with which, (perhaps, happily,) the practical details of every branch of our jurisprudence abound.

Advowsons legally recognised as subjects of commercial dealing, and within scope of laws against perpetuities.

Having ascertained, that the provisions under consideration are not capable of being substantiated as dispositions *in pios usus*, it remains to be inquired, whether there are any considerations of sufficient magnitude, to entitle them to exemption from the operation of the laws against Perpetuities.

Advowsons are, most undoubtedly, recognised by our Courts of law and equity, as a proper subject of commercial dealing: as well, because actions and suits based upon that assumption are of constant occurrence; as, because advowsons are held to be real assets for payment of debts.^(m) The legislature, also, in providing for the sale of advowsons and other ecclesiastical patronage, held by municipal corporations, on the occasion of their recent reform, has expressly sanctioned pecuniary traffic in this species of property.

The Church, indeed, (in the writer's opinion) favors no such bartering with the patronage of her spiritual appointments: with her, questionless, it partakes of the aggravated sin of simony. From laudable motives of policy, she may have parted with the right of nomination to her posts and cures, in consideration of the original endowment of

(m) Burt. Elem. Comp. 413, 414. Ram on Assets, 153.

them by laymen : but she still takes cognizance of the design and grand end of that patronage, and of the qualifications of those who are destined to promote them ; and, in that view, she condemns, as profane and sacrilegious, the transfer for money of the privilege of nominating to her offices.

But, to return, advowsons being legally transferrable by sale, are clearly, so far, embraced by the laws, whose object is to prevent undue restrictions upon the right of alienation, and the trusts in question, consequently, as contravening those laws, would be invalid. And, even, were not advowsons a recognised subject of transfer for pecuniary consideration, it should yet seem, that the right of gift and devise which would still be appurtenant to them, could not be legally infringed by dispositions, withdrawing them from every kind of transfer, alienation, or settlement, in all future time.

And *prima facie*, therefore, trusts in question invalid as creating a perpetuity.

These are the conclusions to which we are unavoidably led, anterior to any considerations that may arise, peculiar to the nature of the property in question. Whether there be any such, of sufficient weight to decide the validity of the dispositions under review, in reference to perpetuity, it will be proper shortly to inquire.

But, lest any theoretical discussion of the point should be considered as possibly precluded, by the judicial recognition of these settlements, it must first be seen, how far this alternative is presented by the authorities.

In the before-mentioned case of *Attorney-General v. Forster*, Lord *Eldon* remarked : (n)—“ Originally, independent of the decisions, I should have had considerable doubt, whether the Court would have executed such a trust. Some of the cases of charitable dispositions come very near this ; and the Court has thought, they could only be executed *cy-près* ; and it would have been questionable, whether a parish could take it. But that is shut out by

The provisions not judicially sanctioned as to this point.

(n) 10 Ves. 340.

decision." And, again, (o)—"Upon this case, it struck me at first, as a point of considerable doubt, whether the Court should execute such a trust. If it was unprejudiced by decision, that doubt might be maintained by strong argument: but it is too late now even to state it; for there is authority binding my judgment entirely upon that. I have looked through the notes of Lord *Hardwicke*, who appears not to have entertained any doubt, that he was bound to execute the trust."

What was the exact character of the doubt, and what were the decisions, here alluded to by Lord *Eldon*, it is difficult to discover, from the report of his lordship's judgment in the case in question. That the former, however, did not contemplate any question of perpetuity, seems clear, from the connexion between the expression of the doubt, and the mention of the "parish taking it:" it appears, in fact, to have had regard, simply, to the capacity of such a body as that of the parishioners or inhabitants of a place, to take or be entrusted with the exercise of the right of patronage to the ecclesiastical benefice thereof. Whether this question referred to the indefiniteness of the body referred to, or to the want of any precedent or analogy, in the general ecclesiastical polity of the country, it is impossible to say. Most probably, however, *this* was the real ground of the doubt made by the learned lord; as his lordship, as well as Lord *Hardwicke*, on several occasions, condemned, in no very measured terms, popular parochial elections. (p) The decisions to which Lord *Eldon* referred, were, doubtless, some of those already mentioned in connexion with the question of the charitable nature of the provisions under consideration. Certain it is, that the Chancellor's remarks had no relation whatever to one class of these provisions, *viz.*, those vesting advowsons in trustees, in trust, from time to time, to present clerks of their

(o) 10 Ves. 342.

346, 347; 2 Russ. 104—110.

(p) See 1 Ves. sr. 414; 10 Ves.

own selection ; and these, therefore, are entirely unaffected by any inference derivable from Lord *Eldon's* observations.

In addition to the sanction, thus qualified and explained, of Lord *Eldon*, is to be adduced a similar expression of approval from Sir *J. L. Knight Bruce*, V. C., in the above-cited case of *Attorney-General v. Cuming*, where that learned judge remarked (q):—"I quite accede to the observation, which has been made, that this is a trust recognised by the law." This sentiment, doubtless, had reference merely to a view of the validity of the trusts in question, similar to that present to the mind of Lord *Eldon*, in the above-quoted observations.

But, even supposing the support thus extended to them, incapable of being limited to any particular ground, it is clear, that that circumstance cannot be deemed of very considerable importance in reference to the point now under consideration ; for, in none of the cases presenting instances of these provisions, was there any adverse claim by persons interested to establish their illegality : in all of them, the proceedings assumed the validity of settlements of advowsons in perpetuity, and related solely to the practical carrying out of them, as between persons whose position and rights did not lead to any antecedent inquiry into their real nature and operation. The question is, therefore, still *res integra* ; and its consideration unprejudiced by authority.

The first observation which occurs, is, that, although the law may not disallow the sale of advowsons, and may otherwise treat them as equally susceptible of settlement and transfer, with inheritances of a more substantial character, yet, that they are not strictly within the scope of the law against Perpetuities ; the design of which is, to promote commercial prosperity, by facilitating the transfer of all property reasonably required for commercial circulation, dealing, and interchange ; which cannot be predicated of perpetual rights

Considerations
tending to
diminish or
remove
objections to
these settle-
ments of
advowsons in
perpetuity.

(q) 2 Yon. & Coll, N. C. C., of advowson in that case, Appendix, 158. See statement of trusts declared No. VI.

of presentation. But, this is a consideration, which, if of any influence at all, goes to the whole question of the applicability of the Rule against Perpetuities to limitations of advowsons; and, in that view, it, clearly, proves too much, since it has been long settled, that the devise of an advowson to a person not necessarily capable within the prescribed period, is void for remoteness. (r) It may be observed, however, that this reflection is supported by the remark, formerly made, that an advowson is a public trust, the discharge of which constitutes the correlative right of the patron; and to this, it might be added, that a duty or the discharge of a public trust is not a property within the purview of the laws securing freedom of alienation.

A reflection of a similar character is, that the right of ecclesiastical patronage (the alone element in this species of property) is regarded by the law, as imposing a permanent obligation, the person invested with which has, in the eye of the law, no interest nor existence, (*quoad* the advowson,) except in relation to the discharge, as occasion arises, of the public duty, wherein consists his property; or, in other words, that the right of patronage is itself a continuity of office, the mode of succession to or acquisition of which is not matter of legal cognizance, so as there be an individual representing it, or the corresponding trust, whenever the period for its exercise or performance arrives. Or, the argument may be differently stated, as showing, that the law regards the office of patron only as an incident to the trust or duty, and does not deem the right of patronage as itself a substantive property, the enjoyment of which is of any intrinsic value, or individual importance, apart from the object designed in the institution of patronage. To a theory of this kind, however, there is the same objection, as that noticed in reference to the previous hypothesis, namely, that it tends wholly to exempt advowsons from the operation

(r) *Proctor v. Bishop of Bath and Wells*, 2 H. Bl. 358; stated and ob- served upon, *supra*, p. 465.

of the laws against remoteness; a position, which is not sustainable, consistently with established decisions.

A third consideration (of a different character) is, that the trusts, whose validity is in discussion, though of a nature, which, in regard to other kinds of property, would be exposed to objection, as rendering property unalienable, in fact and reality, only provide, by a perpetual succession of patrons, for the due and regular exercise of that right, or the discharge of that duty, in which alone the ownership of ecclesiastical patronage subsists: that, in fact, the right protected and created by law, and the provision made by the trust, are reciprocal and coextensive. This is an important view of the question, and, at all events, clearly shows, that advowsons are a species of property, *sui generis*, and that, in their connexion with the laws against Perpetuities, they are not to be violently assimilated to other descriptions of proprietary rights.

The individual or combined weight of any or all of these considerations, it is impossible accurately to determine, in the absence of judicial guidance. The writer is unable to suggest any other grounds, which can assist the dispositions under observation, or, any, sufficiently potent to justify a conclusion in favor of their validity. The point is one, as far as respects adjudication, *primæ impressionis*; and although the trusts in question are, in the writer's opinion, unsustainable as charitable uses, and have an undoubted tendency (nay, themselves operate) to lock up the subject of them in all time, yet, the frequency of their occurrence, and the presumption derivable from judicial and professional silence, would certainly favor the view of their validity, should the point ever call for decision. Perhaps, however, the circumstance of the tacit recognition of these trusts may be found simply to illustrate the truth, that doctrines may, for a long time, be generally received, even among learned bodies, which investigation and inquiry may demonstrate to be insupportable; or, to borrow the words of

But their
validity still
highly
questionable.

Special exemptions from rigor of laws against grants in mortmain or to charitable uses, allowed by the Legislature.

The possessions of the Church not embraced by the laws providing for the free circulation of property.

an eminent Scotch judge, here may prove to be "another consequence of taking propositions for granted; of going upon understandings which have never been canvassed." (s)

To return to the general subject of mortmain and charitable uses:—The stringent restrictions upon alienations in mortmain and to charitable uses, have been remitted by the Legislature, in favor of various religious institutions and objects, which it has lent its assistance to promote. Among the different purposes, for which the grant of lands has been thus permitted, may be mentioned, the erection of new churches, the building of school-houses and rooms, the enlargement of church-yards, the augmentation of small livings, the endowment of benefices with glebe or parsonage-houses, and the general purposes of the board of Governors of Queen Anne's Bounty, and the Commissioners for building new churches. In addition to these, relaxation has also been granted, in favor of various charitable societies and institutions, (t) which it is unnecessary to particularize. It is only to be observed, that, in all these cases, the laws against Perpetuities are substantially superseded, since the exercise of the privilege conferred by the Legislature entirely withdraws the land alienated from commerce and circulation.

It remains, to take notice of a certain description of property, of very great importance, to which the rules of law securing freedom of alienation, are clearly and entirely inapplicable; the inalienability of which is, in fact, attributable to the Law itself, and forms as much a portion of its general policy, as the provisions against Perpetuities. The property in question is that constituting the possessions of the Church, and forming the endowments of her various dignities and cures. Whether in the nature of tithes or commutation rents'-charge, or land, property belonging to the Church is in law for ever set apart to the use and benefit

(s) *Per Lord President Hope*, Shelf. Mortm. and Char. Uses, 42—quoted Sandf. Entail, 320, n. 57.

(t) See 1 Jarm. Wills, 215, 216;

of those who minister in her service; and its perpetual devolution in the same line of successors, is effectually secured by the rule of law, that the interest of each individual possessor is confined to his life, and his power of disposition equally limited. Property thus circumstanced presents a broad contrast to all the other territorial possessions of the kingdom; for, while *these* are constantly experiencing changes of ownership, both in kind and extent, the former knows no other than class (spiritual) proprietors, and they never entitled to more than a contracted dominion. And it is unnecessary to remark, that the value and extent of property so abstracted from general circulation, for the support of the Christian ministry, would now be much more considerable, had not the Church been unjustly and tyrannically despoiled of a fair portion of her possessions, at the ever-memorable æra of the Reformation. Whatever, however, the (reasonable) proportion of national wealth thus withdrawn into the precincts of the Church, the exception, in its favor, from the general laws of property of the realm, is no less certain, than creditable to the religious faith and sincerity of the governing powers of the State.

CHAPTER XXXIII.

OF PERPETUITIES ALLOWED OR CREATED BY ACT OF
PARLIAMENT.

As there is no rule or principle of law so universally expedient or just, but that superior reasons may demand the recognition of exceptions from its operation, so in past ages, it has been found advantageous to the public weal, that special laws should be established, and particular regulations adopted, whose scope and tendency exhibit a striking contrast to that grand feature in the jurisprudential polity of this country, which aims at promoting the circulation and commercial interchange of property of every description. To a short consideration of the nature of these peculiar instances of Legislative interference, a few observations must now be addressed.

At Common law, remainder or reversion in Crown after estate-tail could not be barred by tenant in tail.

Prior to the statute *De donis conditionalibus*, if the king created a conditional fee, by a grant to a man and the heirs of his body, no reversion remained in the Crown, but, simply, a bare possibility of reverter; and if the donee had issue (whereby the condition was performed), and afterwards aliened, the king's possibility was barred, no less than that of a common person. (u)

When the statute *De donis* had converted the possibility of reverter into a reversion, and when, subsequently, the force and validity of a common recovery, as an effectual bar of the estate-tail, with all remainders and reversions,

(u) Pig. Rec. 85. Cfu. Dig. tit. xxxvi., c. 13, s. 20.

was established, the question arose, whether, in the case of a reversion in fee expectant on an estate-tail being vested in *the Crown*, the destructive operation of the recovery could have place. And it was settled, that, by the prerogative of the Crown, the reversion, in such a case, could not be barred by a common recovery; although the estate-tail itself, and all intermediate remainders, between it and the reversion, were destroyed: the recovery, in fact, created a kind of base-fee, determinable with the failure of the issue of the tenant in tail, either alone, or conjoined with the extinction of the intermediate estates (accordingly as any such were or were not limited). (v) And when the interest of the Crown was in the nature of a remainder limited in a private grant, or accrued by forfeiture, it was ruled, that it was equally indestructible; although, as well prior remainders, as all *subsequent* estates, and the reversion, were absolutely barred by the recovery. (w)

A fine, also, levied by a tenant in tail, with an expectant reversion or remainder in the king, was (as it seems) deemed an effectual bar to the issue in tail, under the statute, 4 Hen. 7, c. 24; but such a fine derived no force under the statute, 32 Hen. 8, c. 36, (which first made fines direct legal bars of estates-tail,) for that statute expressly excepted from its operation, fines levied of lands, the reversion whereof was in the Crown, and provided, that they should have no greater efficacy, than previously to its passing.

By the statute, 34 and 35 Hen. 8, c. 20, it was enacted, that no feigned recovery, by assent of parties, against any tenant in tail of any lands given by the Crown, whereof the remainder or reversion, at the time of such recovery had, should be in the king, should bind the heirs in tail, whether any voucher were had in such recovery, or not; but that, after the death of every such tenant in tail, the

Statute 34 and 35 Hen. 8, c. 20, prohibiting bar of estate-tail remainders or reversion, where estate-tail granted as a reward for services, and while re-

(v) Fig. Rec. 86, 87. Prest. Conv. Burt. Elem. Comp. 242. Rand. 19, 146. 2 Cru. Fi. and Rec. 335, Perp. 184. 336; Dig. tit. xxxvi., c. 13, s. 20. (w) Prest. Conv. 19, 146.

remainder or
reversion in
Crown.

heirs in tail might enter and enjoy the lands according to the form of the gift; the recovery, or any other thing done or suffered by or against such tenant in tail, notwithstanding. In the preamble of this statute, mention was simply made of lands granted for "recompense of service;" and it has, therefore, always been held applicable to estates-tail in such lands only. (x) It is clear, however, that the statute equally embraces lands of *the purchase or provision of the Crown*, if granted at the instance of the Crown, and as a reward for services. (y) And it has been also adjudged, that, by this statute, no *fine* levied by a tenant in tail of the gift of the Crown, while the remainder or reversion is in the Crown, shall operate as a bar to the issue in tail, or shall affect the remainder or reversion of the Crown. (z)

By the statute, 34 and 35 Hen. 8, then, all tenants in tail, by the gift or provision of the Crown, in reward of services, are precluded, while a remainder or reversion remains in the Crown, from barring or destroying, either by fine or recovery, the estate-tail, remainders, and reversion, or any of them. But, it must be noted, that this protection continues only so long as the remainder or reversion subsists in the Crown, for if it be granted to or become vested in a private person, the tenant in tail may immediately suffer a common recovery, or execute a disentailing assurance, and thereby acquire the fee-simple. (a)

Where property part of ancient possessions of the Crown, its remainder or reversion cannot be alienated, and

At the present day, indeed, if the lands comprised in the estate-tail form part of the *ancient possessions* of the Crown, it is impossible for any alienation of them to take place; the Crown having been deprived, in the reign of Anne, of the power of granting away such possessions; and, in that case, therefore, the property is absolutely and entirely un-

(x) Dy. 32; 1 Sir W. Bl. 654.
1 Prest. Conv. 145.

(y) Pig. Rec. 91. 1 Prest. Conv.
145.

(z) See 1 Cru. Fi. & Rec. 312,

and authorities there cited; and 1
Prest. Conv. 221.

(a) Pig. Rec. 88. 1 Prest. Conv.
18, 145.

disposable, without resort to the aid of Parliament. When, perpetuity of entail created. however, the Crown is only entitled to a remainder, under a grant from a subject in the instrument creating the estate-tail, it does not seem, that the alienation of that interest (either to a stranger, or to the tenant in tail,) is precluded, since, on the hypothesis, it does not subsist in any portion of the hereditary possessions of the Crown. In such case, consequently, it is in the power of the Crown, by depriving itself of the remainder, to withdraw the property (and, therefore, the interests of the issue, and the intermediate remainders,) from the protection afforded by the 34 and 35 Hen. 8.

Although the statute of Hen. 8 is confined to estates-tail granted as a reward for or in consideration of services, and the prohibition against the bar of the heirs in tail and the remainder-men applies only to such estates, yet, the old Common law prerogative of the Crown still subsists, whereby every reversion or remainder, expectant on an estate-tail, vested in the Crown, (whether by direct grant or reservation, or by forfeiture or escheat,) is preserved from the operation of common recoveries and disentailing assurances, suffered and executed by the tenant in tail. Common law prerogative of Crown not destroyed in cases not embraced by 34 & 35 Hen. 8. (b) Such recoveries and assurances will bar the issue and all ulterior estates limited to subjects; and, in the case of the interest of the Crown being a remainder in tail, those estates (together with the ultimate reversion) will be barred, whether precedent or subsequent to the remainder of the Crown. (c)

It is to be observed, that all estates and interests carved out of a reversion in the Crown are protected by the statute of Hen. 8, so long as the ultimate fee remains in the Crown: (d) but, on the other hand, an estate for life or years granted to the Crown, out of a reversion originally reserved to a private person, is not such an interest as will

(b) Fig. Rec. 86, 87. 1 Prest. Conv. 19, 146. Burt. Elem. Comp. 242.

(c) 1 Prest. Conv. 146.
(d) 1 Prest. Conv. 18, 19.

preclude the tenant in tail from barring his estate-tail, and all the remainders and the reversion (including, of course, the interest of the Crown). (e)

Provisions of 34 & 35 Hen. 8, not allowed to be fraudulently resorted to, in order to create unbarrable entail.

It has been wisely determined, that the provisions of the statute of Hen. 8 shall not be resorted to, for the mere purpose of indirectly creating unbarrable estates-tail, and thereby raising a perpetuity. Therefore, where a person conveyed lands to the Crown, with an intent that the Crown should reconvey to the same person in tail, reserving the ultimate reversion to the Crown, it was held, that such an estate-tail would not be within the protection of the statute. (ee)

It is, of course, clear, that, in the case of a remainder or reversion vested in the Crown, expectant on an estate-tail *not granted for services*, the tenant in tail may levy a fine, which will be attended by the like effect, as in all other cases; *viz.*, the creating a base-fee determinable with the failure of issue of the tenant in tail. And the same may be declared of an enrolled assurance executed by a tenant in tail *in remainder*, under the statute for abolishing fines and recoveries.

Provisions of 34 & 35 Hen. 8, not affected by 3 & 4 Gul. 4, c. 74.

A serious question, in reference to the subject before us, arises upon the provisions of the statute, 3 & 4 Gul. 4, c. 74, for facilitating the barring of estates-tail. By the 18th section of that act, it is provided, that the general power of disposition thereby granted to tenants in tail, shall not extend to tenants of estates-tail, who, by the statute, 34 and 35 Hen. 8, or by any other act, are restrained from barring their estates-tail. So far, consequently, as respects the protection thrown over estates-tail, with the ulterior remainders and reversion, by the statute of Hen. 8, it is clear, the recent disentailing act effects no alteration in the law.

But Common law prerogative of the

But, it will be observed, the ordinary prerogative of the Crown, in reference to reversions on estates-tail not granted

(e) Pig. Rec. 88, 89.

earl of Derby, Pig. Rec. 201; 11

(ee) *Johnson d. earl of Anglesea v.*

Mod. 304; 2 Show. 104.

for services, or to remainders or reversions derived by the Crown under private grants, or by forfeiture, did not and does not arise under any statute, but is of Common law origin solely. If regard be had, therefore, to *the terms* of the above-mentioned provision in the recent statute, it should seem, that the ancient privilege of the Crown, in cases not provided for by the statute of Hen. 8, is wholly taken away: and this conclusion is strongly supported by the fact, that the general enabling clause in the act expressly mentions "the King's most excellent majesty, his heirs and successors," among those, against whom the power of disposition thereby conferred should be operative; which satisfies the general rule of law, that the Crown must be particularly named in an act of Parliament, in order to be bound by it.

Crown not excepted from operation of last-mentioned statute.

The *object and intention* of the statute, 34 and 35 Hen. 8, it has been well said, (*f*) is the perpetuation in families, of those estates which were given or procured to be given to them by the Crown, as a reward for some eminent services, that they might be a perpetual testimony of the munificence of the Crown, and an inducement to those families, to persevere in that loyalty which was the original cause of the gift. And to this, it may be added, that the preamble of the statute shows plainly, that one purpose of the enactment was, the maintenance in respectability and comfort, not alone of the immediate objects of the grant, but also of the posterity of those who are rewarded for signal services rendered to the State, so that the recompense may be more substantial and permanent.

Object and intention of 34 & 35 Hen. 8.

In some respects similar to the statute, 34 and 35 Hen. 8, and the perpetuity of settlement effected by it, are those national provisions for particular distinguished individuals, and their descendants, with which the Crown and Parliament have sometimes honorably rewarded the achievements of bravery, and the exploits of patriotism. It has been

Legislative settlements of estates in favor of families of Marlborough and Wellington.

justly said, (*g*) that, "since the age has lost the fire of chivalry, or virtue has been more duly rewarded, the stimulus of visible magnificence has been a favorite policy, or its riches have been deemed the just reward of merit."

With one instance of this kind, almost all are familiar,—that, namely, of the Legislative (*h*) settlement of the estates of *Blenheim*, upon the famous Duke of *Marlborough* and his posterity, subject to a prohibition against the performance of any act, to unfetter the entail, or to withdraw the estates from the strict line of devolution pointed out by the statutes creating the settlement. To this day, the provision thus made for the family of *Marlborough* has been maintained in all its integrity, (excepting the occasional conferring of special powers, in order to needful reparations, &c.,) as well by the Legislature, as by the judicial interpretation of the statutes granting it.

Another public recognition of eminent services, closely resembling the one just mentioned, is that afforded by the settlement of estates in perpetuity, upon the Duke of *Wellington* and his descendants, subject to restrictions similar to those imposed in the case of the *Marlborough* provision, accompanied by others, equally stringent, in reference to the mode and extent of enjoyment of the property by the successive inheritors of the title and estates, (*i*)

The beneficial character of these variations from the general spirit and provisions of the laws of property, can be questioned, as little as the extraordinary merits of the individuals, in whose favor, and in favor of whose families, they were made; and, in reference to their general bearing upon the subject of this Treatise, it may be said, *exceptio probat regulam*.

(*g*) *Rand. Perp.* 176.

(*h*) See statutes, 3 & 4 Anne, c.

6; 5 Anne, c. 3; 5 Anne, c. 4.

(*i*) See statutes, 41 Geo. 3, c. 59;

42 Geo. 3, c. 113; 54 Geo. 3, c. 6; 161.

CHAPTER XXXIV.

OF THE LAW OF SCOTLAND AS IT RELATES TO
PERPETUITIES.

Between the laws of England and Scotland, as respects the subject of Perpetuities, there is a most extensive difference, almost amounting to utter contrariety.

In a former part of this Treatise, it was seen, that the commercial activity which arose at an early period of the history of England, and the exercise of knowledge and of art which resulted from it, added to the influence of the commons, and, in proportion, diminished the aristocratic power. The effect was soon visible in an inroad upon the feudal system, as respects the laws of alienation which prevailed under it. But, in Scotland, where the same improvements were not so rapidly disseminated, it was much longer before the restraints of that system were even partially removed. (A) It has been well observed by an elegant writer, (B) that the liberal opinions consequent on the increase of wealth, and on the rise of the middling orders into rank and power, did not find their way so early into that kingdom. Scotland did not possess those local advantages, nor that vigour of enterprise, which led to an early collision between the English and the nations of the south, and enriched them, not merely with the productions of other regions, but with

Observations as
to progress of
laws of
alienation in
Scotland.

(A) Sandf. Entail, 30.

(B) Sandf. Entail, 32.

a knowledge of the free institutions, and a love of the liberty of action, which, after a long period of human degradation, again appeared in those states, whose power and fame were founded on their commercial prosperity.

They permit
at present day
the strictest
unbarrable
entail that
can be made.

The influence of the principles of feudalism upon the laws of alienation and settlement in Scotland, is still great; and the enlarged notions of commercial freedom which have long prevailed in this island, have never found their way into the jurisprudential polity of its northern neighbour. This has been the source of frequent and just regret, on the part of very many eminent lawyers and statesmen of that country; and as much leniency and liberality have been introduced by the judicature, into the practical working of the system of entails in Scotland, as it is capable of. But still, it may be affirmed, that, by virtue of the Scotch system of entails, (one, too, recognized by and based upon Statute,) lands in that country may be tied up in a perpetuity of settlement, to an indefinite extent, and the parties successively taking under it be wholly precluded from exercising any of those rights (of alienation, pledge, leasing, &c.,) in which the ownership of heritable property really and substantially consists. The settlor has but to comply with the provisions of the law, in explicitly declaring his intention, and sufficiently guarding and giving effect to it, and his property may be enchained in a series or succession of entails, to which there are no limits, less extensive than his ability to select objects for his dispositive scheme.

To confirm these general remarks, it may be well, briefly to state the principal features of the system of entails, which prevails in Scotland.

1. Entail by
simple desti-
nation.

1. The most unfettered of Scotch entails much resembles the simple estate-tail in England. It is called an *entail by simple destination*, the effect of which is, to vest the property in the various substitutes, (that is, the grantees or donees,) according to the order of succession pointed out in the

entail, *as long as no alienation is made by any of the heirs of entail* succeeding to the estate; but, as each such heir of entail is in law a fee-simple owner, he may alienate the lands, or alter the mode of succession, at his discretion. (m) When these entails by simple destination contain (as is sometimes the case,) a *clause of return* to the grantor and his heirs, on failure of the grantees, the land may still be alienated for *valuable* or *pecuniary consideration* (or, to observe technical phraseology, for an *onerous cause*). In reference, however, to *gratuitous* (or, as the expression would here be, *voluntary*,) alienation by the disponees taking under the settlement, the right to make such a gratuitous disposition, in prejudice of the clause of return, will depend on the character of the original settlement. If that be gratuitous, the clause of return is held to be a condition of the grant, and the grantor and his heirs cannot be gratuitously disappointed: if, however, the original settlement be onerous, (that is, granted in fulfilment of any antecedent legal obligation,) the clause of return may be defeated gratuitously.

2. A mode of settlement, more stringent than the last-mentioned, is that called *entail with prohibitory clauses*, which declare that it shall not be lawful for the heirs of entail to contract debt, alienate the property, or alter the destination, or do any other act whereby the lands may be affected. (n) This entail precludes any of the grantees from making a *gratuitous* disposition, by which the substitutes or heirs of entail who are to succeed after them, can be disappointed of the succession; and, in case of any such being made, the latter may set it aside, as done to their prejudice. But any of the disponees may, notwithstanding the prohibitory clauses, charge the estates with *debts*, and alienate them for an *onerous cause*, and so free the property

2. Entail with prohibitory clauses.

(m) Sandf. Entail, 44, 45.

(n) Sandf. Entail, 101—114.

from the fetters of the entail; and, in that case, they will not be under any personal obligation, to exonerate or purge the estate from the debts, or (in the case of sale) to pay to the heirs of entail or substitutes, the value of the estate sold, for the purpose of investment in the purchase of property to be settled in accordance with the original entail: the heir in possession, in fact, is not under the necessity of transmitting the estate to the heirs of entail, according to the intention of the original disponent or settlor.

Thus far, consequently, we perceive, that, although, in the case of entails with prohibitory clauses, the power of disposition possessed by the grantees, is by no means equal to that legally secured to tenants in tail and other donees in England, yet, neither such entails, nor entails by simple destination, operate in entire exclusion of the right of alienation and pledge. The true genius, however, of the Scotch system of settlements still remains to be exhibited in,

3. Entail with
irritant and
resolutive
clauses.

3. The third kind of entail, which is that technically termed, *entail with irritant and resolutive clauses*, (o) a species of settlement, which owes its origin to an express enactment of the Scotch Legislature, made in the year 1685; and which must satisfy even the most exalted and extravagant views, as to the extent of prospective control over property consequent on absolute ownership. The superior strictness of this mode of entail consists in the circumstance, that the prohibitions which constitute the distinguishing feature of the entail last-mentioned, are accompanied by two clauses; one irritating (as the expression is) or annulling acts or deeds granted or done in contravention of the prohibitory clauses of the entail, (that is, the contracting debt upon, or selling, alienating, or altering the mode of succession to, the property,) by declaring, that they shall be null and void; and the other resolving the right of the heir

(o) Sandf. Entail, 117—139.

who contravenes, or, in other words, declaring his right to be forfeited, upon his doing or granting any act or deed contrary to the prohibitions in the entail, and by which the course of succession may be frustrated or prejudged. The force of these clauses is derived from the above-mentioned statute, and they are as much a recognised portion of the entail as the simple destination itself. But it is absolutely necessary, that both the irritant and resolute clauses should occur in the settlement, or the prohibitions will not be effectual; and the latter will merely, therefore, have the limited force of the entail with prohibitory clauses before-mentioned. In giving effect to these prohibitory and accompanying clauses, the Courts have refused to raise any implication or inference, so as to extend them beyond their express terms; but have, rather, desired, by means of such defects, to free the heirs from the fetters of the entail, in regard to acts not directly prohibited by them.

In the nature and tendency of these irritant and resolute clauses, the learned reader will discover a very strong resemblance to the modes of settlement formerly attempted in this country, after the force of common recoveries was established, for the purpose of precluding resort to that mode of unfettering entails; and which, it will be remembered, were (after a period of doubt and discussion) finally adjudged void and illegal, in the reign of Elizabeth. The marked difference between the two systems of law, upon the subject of alienation, in nothing appears more strongly than in this. (*p*)

(*p*) Lord Coke has thus quaintly recorded his gratification, at the fate which these attempts at the creation of perpetuities met with in England: (Pref. to Rep.)—"Thus have I published in *Mary Portington's* case, for the general good both of prince and country, the honorable funeral of fond

and new found perpetuities—a monstrous brood, carved out of mere invention, and never known to the ancient sages of the law. I say monstrous, for that the naturalist saith; '*Quod monstra generantur corruptionem alicujus principis*;' and yet I say honorable, because those vermin

Superiority of
English real
property
system to that
prevalent in
Scotland.

The incomparable superiority of the principles of the English laws of alienation and settlement, over those, the principal features of which have been here glanced at, has been thus, in effect, eloquently portrayed by a writer, all whose prejudices and associations must have inclined him to a preference of the Scotch system. "The history of entails," writes Mr. *Sandford*, (q) "in the different nations where they were introduced, shows, that the disadvantages arising from them were, at a more advanced period of civilization, invariably considered, by the greatest legal philosophers, as counterbalancing their good effects, and as destructive of greater interests than those which they preserved. They are defended on the ground, that they maintain the permanence of noble families, and prevent the decay of aristocratic influence. The example of England might at once be quoted as a sufficient answer to this argument. Families exist there, notwithstanding the freedom of property, over whom centuries have rolled, and still found undiminished in hereditary wealth, in honor, or in rank. But, even if the argument were conclusive, it may at least be doubted, whether the accumulation of overgrown property, in one branch of a family, to the impoverishment of the rest, and the check to agricultural improvement, which the restraints on the proprietor invariably occasion, do not more retard the progress of a rising nation, than the permanence of individual wealth aids its prosperity. The failure of a few great families—the decline of one landed proprietor, and the rise of another—are not events that can affect the general system of society, or ought ever to engage the attention of a nation. It is of little consequence to the

have crept into many honorable families. At whose solemn funeral I was present, and accompanied the dead to the grave of oblivion; but mourned not, for that the commonwealth rejoiced, that fettered free-

holds and inheritances were set at liberty, and many and manifold inconveniences to the head, and all the members of the commonwealth, thereby avoided."

(q) Entail, 41, 42.

greatest interests of a country, whether a name disappear from the records of its glory, or a family sink from its hereditary splendour;—of little importance to its fame, whether the virtues that insure its stability continue to flourish in the same line, or gain honours for a new and hitherto undistinguished race. Rank and power must continue to accompany wealth, and that is the best policy, which, leaving such distinctions open to the ambition of all, does not repress exertion, by narrowing the field for competition.”

ADDENDA. (a)

P. 29.—*At the end of the first paragraph, add a note (gg); and enter it thus:—*

(gg) The same spirit is discernible in the ancient rule, avoiding conditions, upon grants in fee or otherwise, against alienation: see Co. Litt. 223 a.

P. 33.—*In the fifteenth line of the text, after the words, "such lands," add a note (ll); and enter it thus:—*

(ll) See *Doe d. Blesard v. Simpson*, 3 Scott, N. S., 796; 4 Bing., N. S., 383.

P. 54.—*At the end of note (l), add:—*

And see 1 Rep. 124 a; 1 Atk. 591; 1 Sand. Uses & Tr. 86; Cru. Dig. tit. xi., c. 3, s. 5.

P. 61.—*At the end of note (i), add:—*

Butl. n. to Co. Litt. 271 b, n. 1, s. iii. 1. Cru. Dig. tit. xvi., c. 6, s. 32; tit. xxxii., c. 16, s. 61.

And at the end of note (k), add:—

Bac. Uses, 47. Hayes Conv. 60—64. The latter learned writer has humorously observed,—“Over this invention they cast the veil of latinity, and prudently withdrew it, under the learned appellation of *scintilla juris et tituli*, from familiar examination.”

P. 64.—*At the end of note (o), add:—*

And see 1 Sug. Pow. 184, 185.

(a) The greater part of these additions have been rendered necessary, in consequence of cases decided or reported during the progress of this

work through the press: others are introduced, in further confirmation of some of the author's statements and opinions.

P. 67.—*At the end of the fourth line, add a note (zz); and enter it thus :—*

(zz) And see, in exact accordance with the decision in *Bodding-ton v. Abernethy*, the case of *The King v. the lord of the manor of Oundle*, 1 Ad. & Ell. 283 ; 1 Nev. & Man. 586 ; but in that case, the donee of the power, who was entitled in fee until and in default of appointment, had not been admitted.

P. 78.—*At the end of note (n), add :—*

Fearne, Posth. 422. 1 Sand. Uses & Tr. 241, 242, 243. Cru. Dig. tit. xi., c. 4, s. 15.

And at the end of note (o), add :—

1 Sug. Pow. 172—176. 1 Pow. Dev. by Jarm. 209.

P. 90.—*At the end of note (u), add :—*

And see *Goodright v. Parker*, 1 Mau. & Selw. 692.

P. 154.—*In the twenty-eighth line of the text, after the words, "ulterior limitation," add a note (cc); and enter it thus :—*

(cc) See Fearne, Posth. 285 ; 1 Sand. Uses & Tr. 198 ; 1 Jarm. Pow. Dev. 392, n—399, n.

And in the thirty-second line, after the words, "to rest," add a note (ccc); and enter it thus :—

(ccc) See Butl. n. to Co. Litt. 290 b, s. 16 ; Sugd. Gilb. Us. & Tr. 262—267 ; Burt. Elem. Comp. 269 ; judgments in *Theellusson v. Woodford*, 4 Ves. 337, in *Routledge v. Dorril*, 2 Ves. jr. 357, and in *Keily v. Fowler*, Wilm. Rep. 306.

P. 161.—*After the third line of the text, introduce the following paragraph :—*

Whether, indeed, this desirable end has been secured by the decision in *Cadell v. Palmer*, may admit of question ; as will appear upon reference to the late case of *Smith v. Farr* (3 You. & Coll. 328). In that case, property was devised in trust for the testator's children for their lives, and after their decease, in trust that the income should be paid to the testator's surviving grandchildren who should be then living, until the youngest should attain twenty-one, and upon the youngest of them attaining that age, in trust to be divided between all the said grandchildren, and the children of any such grandchild who might be then dead, leaving issue, such children to take their parent's share. Here, it is manifest, the full period of lives in being and twenty-one years was embraced by the limitation to the grandchildren : and it is equally clear, that it was exposed to no objection, on account

of the possibility, that some of the *cestuis que vies* (the testator's children) might be *in ventre sa mere* at the time of the limitation taking effect, and that some of the individuals, whose infancy constituted and swallowed up the additional period or term, might be *in ventre sa mere* at the determination of the lives. Both these contingent periods of gestation are comprised in the limits of the Rule as at present fixed. But, it was argued, in the case in question, that the limitation was too remote, because it extended to objects (namely, great-grandchildren,) who might possibly be *in ventre sa mere* at the determination of the term of twenty-one years, that is, on the attainment by the youngest grandchild of his age of twenty-one: and this further contingent period was not, it was said, within the terms of the Rule against Perpetuities, as settled by *Cadell v. Palmer*. This argument, obviously, overlooks the fact, that the capacity of posthumous issue to take in the same manner as if actually living at the death of the father, is entirely the result of a general rule of law; and that the contingency of the object of a limitation being *in ventre sa mere* when that limitation takes effect, is assumed in every gift sanctioned by law. In addition to this, it is to be observed, that the reasoning which tends to invalidate limitations, on account of an additional period of suspension being required for the birth of objects *in ventre sa mere*, applies, in a much stronger degree, to the contingency, (equally implied in every disposition,) that the legatees or donees may be infants, and that, therefore, the whole or a portion of the period of infancy must elapse, before such legatees or donees can have full enjoyment of the property. And, yet, it will nowhere be seriously argued, that this possible prolongation of the period of suspension, by act of law, beyond the express allowed limits, in any manner affects the validity of the gift, the enjoyment of which is so postponed. (*Vide* p. 168.) The possibility of the party taking under the limitation being *in ventre sa mere*, or an infant, is implied in every disposition, the nature and terms of which do not preclude any such contingency; and the circumstance, that this may be the course of events, in a case, where the whole permitted period of remoteness has been expressly resorted to, can in no way invalidate a limitation otherwise conformable to the rules of law. There seems, therefore, to

be no ground for supposing, that a limitation, which, in its ordinary course of operation, may involve the allowance of two periods of gestation, (one for the ascertainment of the lives, and another for the birth of an infant, after the determination of the lives,) will be in any degree objectionable, by reason of its complete enjoyment being possibly postponed for an additional period, sufficient for the birth of any objects who may be then *in ventre sa mere*, and (consequently) also the term of their infancy.

P. 165.—*In the first line of the text, after the word, "said," add a note (rr) ; and enter it thus :—*

(rr) See Hargr. & Butl. n. to Co. Litt. 20 a, n. 5 ; ib. 271 b, n. 1, s. iii. 2 ; 2 Hargr. Jurid. Arg. 59 ; Powell's n. to F. Ex. Dev. 113 n ; 3 Re. Pr. Com. Rep. 32, 39.

P. 185.—*At the end of the second paragraph, add a note (gg) ; and enter it thus :—*

(gg) See *Habergham v. Vincent*, 5 T. R. 92.

P. 195.—*At the end of note (g), add :—*

Trash v. Wood, 4 Myl. & Cr. 324. See *Mansel v. Grove*, in Chancery, before Sir J. L. K. Bruce, V. C., July 19th, 1843.

P. 225.—*In the twenty-second line of the text, after the word, "them," add a note (vv) ; and enter it thus :—*

(vv) See *Carter v. Bentall*, 2 Beav. 551.

P. 280.—*At the end of note (i), add :—*

But, it may be observed, the question hinted at in the text is now awaiting the decision of the Court of C. B., in the case of *Greenwood v. Rothwell*, there pending. The point, also, recently came before Lord Chancellor *Sugden*, in the case of *Crosier v. Crosier*, 2 Con. & Law, 309, where, in effect, and according to the construction adopted, the limitation was to the issue as tenants in common in fee ; and it was held, that they were entitled by purchase.

P. 305.—*At the end of note (d), add :—*

The principle, that the construction of, "issue," bends to particular circumstances, more easily than that of, "heirs of the body," was also recognised in the recent case of *Crosier v. Crosier*, 2 Con. & Law, 309.

P. 327.—*At the end of the seventh line of the text, add a note (pp) ; and enter it thus :—*

(pp) See the late case of *Mansel v. Grove*, before V. C. Sir J. L. K. Bruce, July 19th, 1843.

P. 829.—*At the end of note (x), add :—*

See the case of *Mansel v. Grove*, *ubi supra*.

P. 847.—*At the end of note (l), add :—*

In support of the position in the text, it is to be observed, that the recent case of *Woodcock v. Rennick*, 4 Beav. 190, establishes, that, where there is no direct independent gift to children, in default of appointment, but that gift is expressed in the sentence which comprises the words creating the power, the objects of the power and the objects of the gift are necessarily the same.

P. 349.—*In note (g), after the reference to Keating v. Keating, add :—*

And *Crosier v. Crozier*, 2 Con. & Law. 309 ; in which latter case, however, no question could arise, as to the effect of a power of distribution upon words referring to a failure of issue, since there was no gift-over after the implied limitation to the issue.

P. 355.—*At the end of note (w), add :—*

And see judgment in *Crosier v. Crozier*, 2 Con. & Law. 309.

P. 384.—*At the end of note (x), add :—*

Indeed, in some cases, the *absence* of a limitation on failure of issue has been relied upon, in support of the construction of the issue taking by *purchase*. See *Crosier v. Crozier*, 2 Con. & Law. 309. *Sed vide* remarks on this doctrine, 2 Jarm Wills, 345.

P. 385.—*After the words, "such issue," in the first line of the text, add :—*

or unless the words of limitation or representation be coupled with words of division or distribution. (*Crosier v. Crozier*, 2 Con. & Law. 309. See, also, as to the latter point, 2 Jarm. Wills, 342 n. 351.)

P. 385.—*At the end, introduce the following paragraph :—*

Again, the construction of, "issue," as a word of purchase, has sometimes proceeded upon the circumstance of the gift to the issue being made in the form of a *power of distribution* vested in the parent. Thus, in the late case of *Crosier v. Crozier*, *ubi supra*, there was a devise to J. C., for life, and after his decease, unto the *issue male and female* of J. C., begotten or to be begotten, on the body of his wife, C. C., to be divided between and amongst them, *in such manner, shares, and proportions, as J. C. should appoint* ; and it

was decided, that J. C. took an estate for life only, and that his children were entitled in remainder, as tenants in common in fee, or, rather, (the property being freehold for lives) of the entire interest. See also the previous cases of *Target v. Gaunt*, *Hockley v. Mawbey*, and *Leeming v. Sherratt*, cited, *supra*, pp. 348, 349.

P. 386.—*At the end of note (d), add :—*

See *Earl of Verulam v. Bathurst*, in Chancery, 8th March, 1843.

P. 389.—*At the end of note (d), add :—*

And see also, judgment of Lord Chancellor *Sugden*, in *Crosier v. Crosier*, 2 Con. & Law. 309.

P. 408.—*At the end of note (n), add :—*

And see also, pp. 38, 41.

P. 419.—*In the seventeenth line of the text, after the word, "boundary," add a note (aa) ; and enter it thus :—*

(aa) And it is, of course, clear, that a limitation will be entirely void, even if it be simply *possible*, that the individuals to take under it, may be the issue of a person unborn, although there is, in fact, a person *in esse*, who may answer the description of parent of the remote objects, and who, in event, actually does so. And, therefore, if a limitation be made to a person *in esse*, for life, and after his decease, to his *second son*, (in general terms, and not by name,) for life, and after his decease, to his first and other sons successively in tail, there seems no room for doubt, that the ulterior remainder is void, because it is not certain, that the person who will answer the description of second son of the first taker is *in esse* ; in other words, that he will prove to be a person, whose issue would be valid objects of express gift, within the provisions of the Rule against Perpetuities. Of this description, were the limitations in the late case of *Wills v. Wills*, 1 Dr. & War. 439 ; but the circumstances were not such as to call for a decision as to the validity of the ulterior gift ; although that point will, doubtless, hereafter, demand attention.

P. 424.—*At the end of the second paragraph, add a note (kk) ; and enter it thus :—*

(kk) In Mr. *Fearne's* Posthumous Works, p. 285, an opinion of that eminent writer is stated, upon a limitation to the first son of D. (a person *in esse*) who should attain twenty-five years of

age ; which Mr. *Fearne* (as it is conceived, very properly,) thought too remote : but the opinion of that learned gentleman is so expressed, as to give rise to an inference, that the *circumstance of D. not having any son born at the time of the creation of the gift*, weighed with 'him in the conclusion at which he arrived. This, however, was, clearly, immaterial : the possibility, that the eldest son attaining twenty-five might prove to be a person unborn, was, undoubtedly, sufficient to invalidate the limitation, although the individual named might have children living, who eventually answered the required description.

P. 450.—*At the end of the paragraph, concluding with the word, "settlement," add a note (aa) ; and enter it thus :—*

(aa) See Sugd. Gilb. Us. & Tr. 275, 276.

P. 456.—*At the end of note (k), add :—*

Fearne, Posth. 285.

P. 459.—*At the end of note (p), add :—*

1 Jarm. Pow. Dev. 407, n.

In the nineteenth line of the text, after the words, "the gift," add a note (pp) ; and enter it thus :—

(pp) An instance of a valid limitation to remote issue, within the terms of the position in the text, occurred in the recent case of *Smith v. Farr*, 3 You. & Coll. 328, where a testator, after directing the residue of his estate to be placed out and invested by trustees on freehold or government securities, bequeathed the interest and dividends to his several children, for their lives, and after the decease of his said children, unto and between *all his surviving grandchildren who should be then living*, until the youngest should attain the age of twenty-one years ; and upon the youngest of them attaining such age, the testator directed, that the whole should be converted into money, and the produce paid and divided between all such his said grandchildren, *and the children and child of any such grandchild who might be then dead*, leaving lawful issue ; such children or child to take his, her, or their parent's share ; and if but one such grandchild who should attain the age of twenty-one, in trust for such grandchild, his or her heirs, executors, administrators, and assigns. A question arose upon the claim of the children of a grandchild who died before some of the testator's children ; and it was held, that the substitutionary gift only extended to issue of those grand-

children who survived all the children ; such grandchildren alone being entitled under the original gift : and no doubt seems to have been (nor could have been) entertained, as to the legal capacity of the great-grandchildren, who were within the terms of the limitation. Such great-grandchildren (although the issue of persons born and unborn) must necessarily be ascertained on the attainment by the youngest grandchild of the age of twenty-one ; and, as that event must happen, if at all, within or at the expiration of twenty-one years from the decease of persons *in esse*, (*viz.*, the testator's children,) the gift was unquestionably good, so far as respects the point of remoteness.

P. 477.—*At the end of the paragraph, add :—*

It is almost unnecessary to observe, that the rule requiring the acquisition of a qualification which is to ascertain the object of a gift, to be such, (either internally, or by express provision,) as will not extend beyond the period of the minority of that person, if possibly or actually unborn, has no applicability whatever to a case, where, from the nature of the description, it must necessarily be represented at the determination of a life in being. Such is the contingency involved in a gift to the individual who shall be the second son of a person *in esse* at the time of his decease : the person eventually filling that character may be a son unborn at the creation of the gift ; but, at whatever age that individual is ascertained, by the death of the parent, a life in being constitutes the extreme period of suspension. A limitation of this kind occurred in the late case of *Wills v. Wills*, 1 Dr. & War. 489, above observed upon in reference to another feature of the dispositive scheme.

P. 488.—*At the end of the first paragraph, add a note (gg) ; and enter it thus :—*

(gg) *Sed vide* 1 Jarm. Pow. Dev. 406, n.

P. 498.—*At the end of note (m), add :—*

And see also remarks of Sir *W. Grant*, M. R., 2 Mer. 391.

P. 510.—*At the end of the paragraph, add :—*

The Real Property Commissioners (3 Rep. 41, 42,) put the case of an executory estate being limited to take effect, either in case A. shall die in the lifetime of B., or in case there shall be an indefinite failure of issue of C., and consider, that such an estate will be wholly void, *because the Rule requires, that it*

should be absolutely certain, that the estate should vest within the proper period. Now, although this, it will be observed, is not strictly an instance of a limitation with a double aspect or on alternative contingencies, it seems highly questionable, whether the limitation supposed is not of a very similar character, and ought not to be allowed to operate upon the same principle. The rule, it is conceived, is not, that it must be absolutely certain, that the estate will vest within the proper period, but, that, *if it take effect at all*, the event on which it is limited to arise, must be such as will necessarily happen within the prescribed limits. Setting aside the remote contingency in the case supposed, (and the rejection of the remote branch of the alternative, is always implied in every instance of a limitation with a double aspect,) this is the character of the gift in case A. shall die in the lifetime of B. ; and it should seem, therefore, that such a gift is open to no just exception.

P. 581.—*At the end of the paragraph, concluding with "entail," add a note (gg); and enter it thus:—*

(gg) See *Phipps v. Kelynge*, 2 Ves. & B. 57, n ; Powell's F. Ex. Dev. 84, n.

P. 597.—*At the end, add the following paragraph:—*

It is to be observed, that a trust for accumulation will not be void, as extending to an indefinite period, when there will certainly be a right in some person interested in the accumulations, or in the property to be obtained by them, to put an end to the former, and claim an absolute transfer of the fund or property, within the legal period. See *Phipps v. Kelynge*, 2 Ves. & B. 57, n. ; and observations of Sir *W. Grant*, M.R., upon that case, 2 Ves. & B. 62, 63. See also Lord *Tregonwell v. Sydenham*, 3 Dow., 194 ; *infra*, 639, 640.

P. 664.—*At the end of the first paragraph, add a note (kk); and enter it thus:—*

(kk) See, as authorities, *St. George v. St. George*, Print. Ca. Dom. Proc. 1767, ca. 26 ; *Nicholls v. Sheffield*, 2 Bro. C. C. 215 ; *Heneage v. Heneage*, 4 T. R. 13 ; Butl. n. to Co. Litt. 271 b, n. 1, s. iii. 2 ; F. C. R. 563 ; Gilb. Us. & Tr. 157, 158 ; 1 Sand. Us. & Tr. 194 ; 1 Jarm. Pow. Dev. 408 ; Cru. Dig. tit. xxxii., c. 26, s. 18.

FINIS.

[APPENDIX

APPENDIX.

I.

Extract from the Third Report of the Commissioners appointed to inquire into the Law of England respecting Real Property, presented to King William the Fourth, in May, 1832.

ALL future interests, not being remainders, are restrained in their limits by the rules of law relating to Perpetuities; and upon these it will be necessary to offer some remarks, pointing out their origin, and recommending some modification as to their boundaries.

The ancient Common law did not restrain the creation of future interests to a given period. The time allowed for re-entries under conditions broken, and for grants of rent-charges, or other incorporeal hereditaments, commencing *in futuro*, and for creating the *interesse termini*, was indefinite, however Courts of Justice may at present be disposed to consider them within that policy of the law which restrains perpetuities. Sir *Edward Coke* expressly says, "If I enfeoff another of an acre of ground, upon condition that if mine heir shall pay the feoffee, &c., twenty shillings, he and his heirs shall enter, this condition is good." We know of no bounds originally fixed by the Common law within which interests of these kinds were restrained; and it is a mistake to suppose that at the Common law, properly so called, there was any rule against perpetuities. The rule of construction said to have been adopted, that a remainder is not valid if it be to take effect upon a possibility grounded upon a possibility, or upon a double possibility, had no reference to the laws against perpetuities. Lord *Coke* observes, "A possibility which shall make a remainder good ought to be a common possibility, and *potentia propinqua*, as death, or death without issue, or coverture, or the like. If a lease be made for life, with remainder to the heirs of J. S., this is good, for by common

No period of Perpetuity was known at the Common law.

The rule that a remainder could not be limited on a double possibility had no reference to perpetuity.

2 Co. 61.

possibility, J. S. may die during the life of the tenant for life ; but if at the time of the limitation there is no such person as J. S., but during the life of the tenant for life J. S. is born and dies, his heir shall never take." This amounts to a double possibility ; first, that such a person as J. S. shall be born, which is very uncertain ; and, secondly, that he shall die during the particular-estate, which is another uncertainty grafted upon the former. Now this has nothing *restrictive of alienation* in it, since both the common and double possibility must have taken effect, if at all, upon the determination of the particular-estate.

The existence
of that rule
doubtful.

Indeed the existence of the rule itself may be considered as extremely doubtful. Lord Chancellor *Nottingham* observed, "That there may be a possibility upon a possibility, and that there may be a contingency upon a contingency, is neither unnatural nor absurd in itself ; but the contrary rule, given as a reason by my Lord *Popham* in the *Rector of Chedington's* case, looks like a reason of art, but in truth there is no kind of reason in it, and I have known that rule often denied in Westminster Hall."

Legislative
declaration
recommended.

Modern determinations have established his lordship's opinion ; but we think it advisable that the law should be relieved by a legislative declaration from that doubt to which it must be considered exposed, from the conflicting doctrines of such high authorities.

18 Ed. 1, Stat.
de donis,
allowed per-
petual entail.

At an early period (18 Edw. 1,) an Act, commonly called the Statute *De donis conditionalibus*, created a direct perpetuity, by enabling parties to establish a perpetual and unalienable entail ; and this continued until the ingenuity and good sense of judges, without the aid of the legislature, and in opposition to a positive Act of Parliament, enabled tenants in tail to unfetter their estates, in favor of the free circulation of property. The invention or application of recoveries having enabled persons to defeat the provisions of the Statute *De donis conditionalibus*, and the evils attending on perpetual entails having been experienced, the judges became jealous of allowing any limitation tending to a perpetuity. The present laws against perpetuities seem to have originated subsequently to the allowance of recoveries, in order to provide against attempts by covenants, or provisions in settlements, to restrain tenants in tail from suffering recoveries, or levying fines. Sir *Francis Bacon* observes, "There is started up a device called perpetuity ; which is entail, with a proviso conditional tied to his estate not to put away the land from his next heir, and if he do,

Common re-
coveries
introduced to
correct this ;
and the judges
became jealous
of perpetuities.

to forfeit his own estate. Which perpetuities, if they should stand, would bring in all the former inconveniences subject to entails, and far greater." It is sufficient to say, in the language of Sir *Francis Bacon*, that these perpetuities "did not stand;" and from this period, upon an authority of such weight, we may date the first attempt to create perpetuities. Since that period there has been a continual struggle between ingenious lawyers on the one hand, to lengthen the periods of perpetuity, and Courts of Justice on the other, to restrain them within proper limits. It will not be improper to trace shortly the history of modern perpetuities.

The most obvious mode seems to have been that of creating in wills direct limitations, within which the inheritance was attempted to be prevented from vesting in any person, as a devise to one for life, and afterwards to every one who should be his heir for life; so a devise to J. S. for ninety-nine years, if he should so long live, with remainder to the first, second, third, and fourth sons of J. S., and the issue male of their bodies, for the like term of ninety-nine years, if they should respectively so long live, as they should be in seniority of birth. In the first of these cases, the Court adjudged an estate in possession to the first devisee for life, with remainder to the next heir for life, but no estate to any other heir; and in the second, the devises to J. S., and his first unborn child were held good, but every other devise was considered void.

In these cases the ulterior limitations were considered inoperative; but in other cases Courts of Justice have, in aid of the intention, supported limitations of a similar nature, not as estates for life, but as estates-tail to the unborn sons under a doctrine called *cy-prés*. Thus, where there was a devise to trustees in trust to convey to A. for life, and after his decease to his first son for life, and so to the first son of such first son for life, &c.; and if no issue male of the first son, then to the second son of A. for life, and to his first son, &c., with many remainders-over to persons for their lives successively, Lord *Cowper* held this to be a perpetuity; but that the conveyance was to be made by the trustees *as near* the intent as the rules of law would permit; that is, by making all the persons in being tenants for life, and limiting estates-tail to the unborn sons. This, it will be observed, was the case of an executory trust, in the execution of which the Court of Chancery assumes considerable latitude of construction, in order to assist the intention; but there are instances in which the rule has been

History of modern attempts to create perpetuities.

1. By making successive estates for life, or years determinable with lives.

In these cases the ulterior limitations were held void; in others a perpetuity was avoided by the *cy-prés* doctrine.

adopted in the case of legal devices. The doctrine of *cy-prés*, however, has not been extended to limitations in a deed.

By construing limitations to unborn sons (where there are words to authorize it, as in default of issue male, &c.,) to be estates in tail in such sons, a perpetuity was avoided; for the first tenant in tail in possession might, by means of a common recovery, acquire the fee-simple by destroying the estate-tail, and all remainders expectant on it.

2. By powers of revocation, authorizing the conversion of estates-tail into life-estates, this was held void.

Another contrivance was resorted to, for establishing life-estates to unborn descendants in succession, by the aid of powers of revocation. An estate was devised to A. B., during his life, with remainder to his first and other sons successively in tail; but with a direction to trustees, upon the birth of every son, tenant in tail, to revoke the estate-tail limited to the son, and to reduce it to a tenancy for life, with remainder to his first and other sons successively in tail; and thus by creating a succession of estates for life, by way of substitution for the original estates-tail, to create a direct perpetuity. This contrivance, however, also failed of effect.

Various expedients were thus from time to time resorted to, in order to perpetuate the possession of estates in families; but such expedients were invariably disappointed, from the determination of the Courts to defeat all contrivances tending to effect an object which they considered it so impolitic to allow to be effected.

3. By constructing springing and shifting uses, executory devises and executory trusts.

The ingenuity, however, of later times, at length invented a system which enabled the possessors of property to tie it up for a more considerable period than the law had hitherto allowed; and this was accomplished by constructing, out of the Statute of Uses and Wills, in connexion with the doctrine of trusts, that species of estates already alluded to, called (according to the mode of their creation,) Springing or Shifting Uses, Executory Devises, or Executory Trusts. It is with reference to these estates that the modern doctrine, limiting the extent of perpetuities, has arisen; and it is owing to this circumstance that it has been so little discussed with reference to estates and interests arising by other means. If, for instance, an estate were devised, or a use limited to a man and his heirs for ever, which would confer on him a fee-simple, and upon which a remainder could not have been limited at the Common law, but if he should die, leaving J. S., then to J. S., this was an executory devise, or, as the case might be, a springing use, which, taking effect within the compass of a life, was held good.

It is useless to mention, in detail, the various cases which have been determined on this subject. But we consider it proper to state the leading case, (the Duke of Norfolk's, 1681,) which was in substance thus : Henry Frederick, Earl of Arundel, had issue, Thomas (his eldest son), Henry, Charles, Edward, Francis, and Bernard, and a daughter Katherine ; Thomas, the eldest son, was *non compos mentis*. By indenture, dated the 4th day of March, 1647, and made between the Earl of the one part, and the Duke of Richmond and others of the other part, the Baronies of G. and B. were conveyed to the use of the Earl for life, with remainder to trustees for 200 years, with remainder to Henry, the second son, and the heirs male of his body, with remainder to Charles in tail-male, with remainder to Edward in tail-male, with remainder in like manner to the other sons, with remainder to the right heirs of the Earl. By another deed the trusts of the term of 200 years were declared to be to attend the inheritance ; the profits to be received by Henry, the second son, and the heirs male of his body ; and in default of such issue by such other persons as, according to the limitation of uses, would have been entitled to them in case no such term had been created, so long as Thomas, (the eldest son,) or any issue male of his body should live ; but in case Thomas should die without issue male, in the lifetime of Henry, or if after his death the dignity of Earl of Arundel should descend upon Henry, then Henry or his issue should have no further benefit of the term of 200 years, but the benefit of it should accrue to Charles and the heirs male of his body, with like limitations-over to the rest in succession.

Thomas, the eldest son, died without issue male, and the Earldom of Arundel and Dukedom of Norfolk descended upon Henry.

A question arose, whether the trust of the term for Charles, &c., was valid after the trust for Henry and the heirs male of his body ? It must be observed, that the trust for Henry and the heirs male of his body, if it had rested there, would have vested the whole beneficial interest in him, subject to the previous trust, that the term should attend the inheritance ; and, therefore, the real point was, whether the executory trust, to take effect upon the event of Thomas dying without issue male, during Henry's life, could be supported in equity.

The Lords Chief Justices, *Pemberton* and *North*, and the Chief Baron *Montague*, unanimously considered the trust for Charles,

in the event of the death of Thomas without issue male in the lifetime of Henry, void; but the Lord Chancellor *Nottingham*, in a distinguished argument, decided it to be good, which decree was afterwards affirmed in the House of Lords. The ground of this decision was, that the trust for Charles was to take effect during Henry's life, and, therefore, not against the rule of perpetuity.

It was argued in this case, that all the trusts subsequently to the trusts for Charles and the heirs male of his body were void, as directly tending to a perpetuity.

Limitation of
executory
devise, &c.,
ultimately
settled at a life
or lives in
being, and a
minority with
allowance for
periods of
gestation.

As the Court of Chancery thus allowed a limitation defeating a prior estate, upon an event happening during one life in being at the time the limitation was created, it seemed to follow that the principle of the decision would extend to any number of lives then living; for whatever might have been the number, the trust or limitation was still in fact confined to one life, that is to say, the life of the survivor. Subsequently, Courts of Justice prolonged the period during which property might be rendered inalienable beyond a life or lives in being to the extent of the minority of an infant person, allowing also the period of gestation for the birth of such infant person; and this was done in analogy to the case of settlements; for if a settlement had been made to the use of A. for life, with remainder to his first and other sons successively in tail, with remainders-over, the first tenant in tail could not be deprived of the possession beyond a life in being, although in consequence of his minority he might have been deprived of the actual power of alienation until twenty-one years after.

But not yet
settled whether
twenty-one
years may be
taken as a
term in gross.

In a late case the question was raised, whether a limitation after an estate for life or lives in being, and a gross term of twenty-one years, was authorized by the rule prescribing the limits of springing uses, and executory devises; and, it was contended that, by analogy to settlements, the twenty-one years must depend upon the minority of a person intended to take under the limitations.

The decision in that case has not been considered to settle the question. It has been revived in a case which we shall presently notice.

4. By intro-
ducing a
great number
of lives, and
accumulation.
Thellusson's
case.

The late Mr. *Thellusson's* will shows the inconvenience which might attend the allowing executory or springing limitations to depend upon a great number of lives.

In that case the testator directed that his trustees, their heirs and assigns, should from time to time, during the lives of his sons,

Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson, and of his grandson, John Thellusson, and of such other sons as his son, Peter Isaac Thellusson, then had or might have, and of such issue as his said grandson, John Thellusson, might have, and of such issue as any other sons of his son, Peter Isaac Thellusson, might have, and of such sons as his sons, George Woodford Thellusson and Charles Thellusson, might have, and of such issue as such sons might have, *as should be living at the time of his decease, or born in due time afterwards*, and during the lives of the survivors and survivor of the several persons aforesaid, receive the rents of the estates by the testator devised and directed to be purchased; and should from time to time invest the monies arising from the rents in such purchases as he had before directed to be made with his personal estate, and, from time to time should receive and invest the rents of the said manors, &c., in the manner thereinbefore directed with respect to the rents of the estates by him devised, and to be originally purchased as aforesaid; and then the testator directed that the estates devised and directed to be purchased, should be divided into three lots, and that the premises contained in one of the lots should be conveyed to the eldest male lineal descendant, then living, of his son Peter Isaac Thellusson in tail-male, with limitations-over in moieties to the respective future male descendants of the two younger sons, with cross-remainders; and then he directed a settlement to be made of the two other lots, in the like manner. These devises were sustained by a decree of the Court of Chancery, and afterwards on an appeal to the House of Lords.

It will be seen that, by the above plan, the rents were to be accumulated during the lives of the numerous persons therein mentioned, who should be living at the testator's death; and afterwards, the estates were directed to be settled in such manner, that the first tenant in tail could not be ascertained until the death of the surviving *cestui que vie*.

The testator died, entitled to a considerable real and personal estate. Taking such real and personal estate to amount, at the testator's decease, to 600,000*l.*, it was stated by Mr. *Hargrave*, that the fund might, by the means of accumulation, amount, in a possible case of the duration of lives, and twenty-one years afterwards, to seventeen or eighteen millions of money.

A case, so extravagant, and so contrary to policy, did not escape the attention of the Legislature, which, by the Statute 39 & 40 Geo. 3, c. 98, restrained the period of accumulation "to the

The power of directing accumulation restrained by

stat. 39 & 40
Geo. 3, c. 98.

life or lives of any grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of such grantor, settlor, deviser or testator, or during the minority, or respective minorities, of any person or persons who shall be living, or in *ventre sa mere*, at the time of the death of such grantor, &c., or during the minority, or respective minorities only, of any person or persons who, under the uses or estates of the deeds, surrenders, wills, or other assurances, directing such accumulation, would, for the time being, if of full age, be entitled to the rents, &c., so to be accumulated;" but with an exception as to provisions for the payment of debts, or raising portions for children, taking under such conveyance, &c. This Act made, however, no alteration in the period allowed for deferring the vesting of estates to take effect after a life or lives in being, and twenty-one years afterwards, but merely confined the period of accumulation. It afforded, therefore, but a partial remedy.

Case of *Ben-
gough v.
Edridge*.

In a still later case, limitations of the inheritance were suspended during the lives of twenty-eight persons, and the survivor of them, and a gross term of twenty years; and the estate created for that period (which was held by the Vice Chancellor to be good in law) was then made the subject of a series of limitations which, taken by themselves, and as limited out of the fee, would have been invalid. A limitation, for instance, to the son of an unborn son, for ninety-nine years, if he should so long live, was carved out of it; and although this limitation, if considered by itself, would have been bad, yet when it came to be taken as covering a portion only of the main period assigned for the suspension of the estate, it was held good; for as the whole period did not exceed lives in being, and twenty years afterwards, there was no perpetuity, and if there was no perpetuity in the whole, there could be none in the part. After the decease of the surviving life, and the end of the term of twenty-one years, the estates were settled to uses in strict settlement; in such manner, however, that the first taker would not be ascertained until that period arrived. The whole of this was effected by a will, which in its different clauses and provisions, may be considered as an ingenious and complicated piece of legal machinery.

Conclusion that
this branch of
law has been
created by the
Courts, and has
gradually been
extended.

From the above observations it will be seen, that the Earl of *Nottingham*, in the reign of Charles the Second, allowed, against the opinion of three judges of the Common law, an executory devise or trust to take effect, and defeat prior existing estates, after one life in being. From that time the progress of these

novelties in the law has been slow ; but still, by almost imperceptible degrees, the known limits have been extended from one life to two or more lives, and ultimately to twenty-eight lives and the life of the survivor, and, after the decease of the survivor, to a gross term of twenty-one years ; and upon the same principle the period may be extended to any number of lives, for the reason which the judges have given for sanctioning the extension of the number of lives in being, is, that the lives are wearing away at the same time, or, as it has been expressed, " all the candles are burning at once."

Settlements of leasehold estates for lives do not at first view appear to be within the scope of the rule ; for they do not seem to be subject to the inconveniences attending restricted alienation, since the lease, ending with a life or lives in being, the death of the surviving life is a determination of the settlement ; yet it is manifest, that when the lease is renewable, either under an express covenant, or by custom, or where it is in fact from time to time renewed, the expiration of the original lease for lives is merely nominal. It may substantially amount to a settlement, if not of the fee-simple, at least of an interest, which may exceed the boundary of perpetuity.

Settlement of leaseholds for lives renewable within the same mischief.

Questions frequently arise, whether powers operating as contingent and springing uses, are, from the generality of the words creating the powers, within the limits of the rule. It may be proper to state some remarks upon the nature and extent of these powers, for they frequently occur in practice, and, in respect to most of them, doubts are entertained.

Powers the subject of doubts.

If an estate were settled to the use of A. B. and his heirs, with a power of sale, or revocation, reserved to C. D. and his heirs, without requiring the consent of A. B., or the person, for the time being, entitled to the beneficial ownership, to the exercise of the power, this would have a direct tendency to a perpetuity, and would, it is conceived, according to the present state of the law, be void ; but we are not aware that it has been so expressly determined.

1. Use to A. in fee, with power of revocation to B. and his heirs.

On the contrary, if an estate be limited to the use of A. B. and his heirs, with a power reserved to C. D. and E. F., and the survivor of them, and his heirs, to sell or exchange, with the consent of A. B., or the persons for the time being entitled to the ownership, there seems to be no ground for considering this objectionable, on account of its tending to a perpetuity ; for the convey-

2. Use to A. in fee, with power of revocation to trustees, with consent of the person entitled.

ance of the estate by the person entitled to the ownership would, in effect, destroy the power, as he could not afterwards consent to the exercise of the power; that is to say, he could not defeat his own act or conveyance by a subsequent exercise of his power.

3. Use to A. for life, with remainders in strict settlement, with power of revocation to third persons to be executed with consent.

Upon the same principle, if an estate limited to the use of A. B., for life, with remainder (in the usual way of settlements) to the use of the first and other sons successively in tail, with remainders-over of a similar nature, with the ultimate remainder to C. D. in fee-simple, with a power of revocation reserved to some other person, but not to be exercised without the consent of A. B., or the person entitled to the freehold or inheritance, this power seems not to be against the rule of perpetuity, for a recovery by the first tenant in tail, in possession, or a common conveyance, after the determination of the preceding limitations, by the remainder-man in fee, would prevent any subsequent exercise of the power.

4. Use to A. B. for 1000 years, remainder to C. D. in fee, with power to C. D. and his heirs to revoke the term.

But if an estate be limited to A. B. for a term of 1000 years, so as to vest the absolute legal and equitable interest in him, with remainder to C. D. and his heirs, and with a power reserved to the same C. D. and his heirs, to revoke or determine the term, there is reason to suppose this power would be void; for the power might be exercised after the period fixed as the boundary for perpetuities.

5. Use in a marriage-settlement to trustees for 1000 years preceding all other limitations, but for a purpose connected with them.

The case seems to be essentially different, where in the usual way of marriage-settlements, a term of years preceding all the other limitations is limited to trustees, for a particular purpose connected with the other limitations in the settlement, and usually with a provision for the cesser of the term, when the purpose for which it was created has been effected (as a term either for securing a jointure, or for raising portions for younger children), subject to a power of sale and exchange, to be exercised only with the consent of the beneficial owner, and which power, if exercised, would, of course, overreach all the preceding limitations. This power can scarcely be said to have any tendency to a perpetuity as defeating the preceding term; for, in the former case, the term must determine with the death of the jointress, and payment of the arrears, if any, of the jointure, and in the latter, upon payment of the portions; and if it be alleged, that the payment of the arrears of the jointure in the one case, and of the portions in the other, may protract the duration of the term beyond the limits of the restraint upon perpetuities, so as to render

it in effect an absolute term, the proposition may be denied, because the mere circumstance that the arrears and portions may not be raised or paid for a period beyond a life or lives in being and twenty-one years afterwards, if they were (as they must be) necessarily raisable and payable within the term, or immediately on the expiration of it, does not render the trust for raising them void in equity ; and if the trust be not void in equity, how can the cesser of the term upon the same event be deemed too remote at law ? The rules of law and equity, so far as they concern perpetuities, do not, we apprehend, differ.

From these observations, it may be inferred that the power in the case put is not void *ab initio*, by reason of its tendency to overreach a preceding term ; and if so, it cannot, as it is conceived, be void by the term afterwards becoming absolute by alienation, as by a sale for the purpose of raising the money secured by it. The exercise of the power cannot afterwards defeat the term made absolute by alienation, but the power may nevertheless be exercised in respect to the other limitations, but subject to the term ; as in the case where a tenant for life, whose consent is necessary to the exercise of a power, makes a lease, there the subsequent exercise of the power cannot overreach the lease. Supposing, however, that the term be in its creation absolute, or without any clause of cesser, yet, considering that it is a mere security for the payment of a sum of money, and that subject to that charge, and until the term is absolutely aliened for raising the money, the term is consolidated with the other limitations in the settlement, and attendant upon them, there seems to be no substantial objection to the power on the ground of perpetuity.

With respect to springing and shifting uses, and executory devises, to take effect upon the neglect of using or continuing a particular name, and using certain arms, or upon the accession of another estate, the rules limiting them within the bounds of perpetuity are well known, and do not call for any particular notice.

Shifting uses dependent on using name and arms.

A power of sale for raising money for payment of debts generally, does not seem to be within the reasons of the rule against perpetuities.

Power of sale for payment of debts.

Courts of Justice do not hold trusts, executory devises, or springing uses, which tend to a perpetuity, valid to the extent of the rule, and void only as to the excess, a doctrine which (as we

Executory devise, &c., cannot be partially good.

shall hereafter remark more fully) has been thought to occasion much hardship.

Common law interests not affected by the Statute of Uses and Wills within the policy of the rule of perpetuity.

The instances hitherto adduced in illustration of the law of perpetuity, are of interests springing out of the Statute of Uses and Wills, or deriving effect as executory trusts; but there are interests, which, as they have remained interests at the Common law, and uninfluenced by the Statute of Uses, or by the doctrine of trusts or devises, have never been considered to be subject to the rules against perpetuity. We think it proper to make some observations on these interests, for we apprehend they are clearly within the policy, which the law has adopted with respect to perpetuities.

1. Terms of years to commence in futuro.

1st. As to terms of years, it has been already observed, that there was no limit by the Common law to their commencement.

2. Rents limited to commence in futuro.

2nd. As to Common law rents, they seem to be placed on the same footing as terms of years.

3. Rights of entry for conditions broken.

3rd. As to rights of entry upon conditions broken, they seem not to be confined within the rule. The following case frequently occurs in practice, and as far as we know, has never been determined; an estate is devised to A. B., "his heirs and assigns," on condition that he and they should take, and continue to use the name and arms of C. D. This, if anything, is strictly a condition at the Common law, enabling the heir-at-law of the testator (in terms at least) at any future time to enter, in case A. B. his heirs or assigns should refuse to take the name, and use the arms of C. D., although if there had been a devise to another in case he should refuse or neglect to take the name, or use the arms, it would have been an executory devise. Sometimes a condition of this kind has been considered void on account of the absurd consequences to which it would lead.

Devise to A. B., his heirs and assigns, on condition that he and they shall take and continue the name and arms.

The absurd consequences which may result from such a condition, if good.

It is not a determinable or conditional fee.

There are other views in which this case has been considered, independently of its absurdity or tendency to a perpetuity. Some have thought that the will passed a fee-simple, determinable upon the non-performance of the condition; but it was not a determinable fee in the proper sense of the expression, if (as is perhaps the true state of the law on this subject) a determinable fee was an estate before the statute of *quia emptores*, as upon a grant to A. B. and his heirs, so long as J. S. and his issue should live, in which case the donor retained in the nature of a right to an escheat, a reversionary interest which arose on the death of J. S., and the failure of his issue. But the statute of *quia emptores*, by

destroying the tenure between the donor and donee, in cases where the fee was granted subsequently to the statute, put an end to any right of reverter on such grants. Accordingly, it is said in 2 And. 138, to have been held in a case in the Book of Assizes, that if land be granted to one and his heirs, so long as J. S. or his heirs may enjoy the manor of D., the words "so long as, &c." are utterly vain and idle, and do not abridge the estate.

Neither was it a fee-simple conditional at the Common law before the statute *De donis*, for such an estate was constituted by a gift or a conveyance to a man, and the heirs of his body. This was considered equivalent to a grant of the fee-simple upon which no remainder could be grafted, in the same manner as if the grant had been to A. and his heirs, if he had heirs of his body. The birth of issue was considered as a performance of the condition, which enabled the donee by alienation to destroy the right of reverter. The remedy for the recovery of land upon the reverter, was not by entry for a condition broken, but by a formedon in the reverter.

The case put, therefore, was not a determinable fee, nor a fee-simple conditional at the Common law ; it was simply a condition, upon the breach of which the heir of the testator might re-enter.

The rules relating to conditions seem to be coeval with our laws relating to Real Property ; and it is a singular circumstance, that a difficulty should now arise of defining the nature and extent of a condition of the kind above-mentioned.

To every exchange at the Common law, an implied condition is annexed, that if either of the parties exchanging be afterwards evicted from the estate he has taken in exchange, owing to a failure in the title of the other party, the party so evicted may re-enter on the estate which he originally gave in exchange for the one of which he has been deprived, and no period is fixed within which the re-entry is to be made.

Implied conditions for re-entry upon an exchange.

In cases where shifting uses are adopted as a substitute for the right of entry, they appear to be directly within the rule against perpetuities.

There are some rights of entry under conditions, to which it may be safely concluded that the rule against perpetuities should not be applied, as where a perpetual rent-charge is granted, with a power of entry for satisfying the rent when in arrear ; in such case the right of entry is necessarily co-extensive with the rent, and must follow it.

Rights of entry under conditions *quousque* (as for securing rents).

Summary.

We have thus taken a review of those parts of the existing law relating to perpetuities, and those subjects connected with it, as to which we consider legislative enactment or declaration desirable. It will readily be admitted, that this is a subject of great importance, and great difficulty. We think it will not be denied, that the restrictions imposed by this doctrine of the Courts are both beneficial and reasonable in their general extent. There being, therefore, no question as to the propriety of continuing this branch of the Law of Real Property, we have considered whether any alteration can be usefully made in the details of the law itself, and especially whether it is expedient to retain, in all cases, that part of the rule which determines, that estates or interests created so as not necessarily to vest within the period allowed, shall be altogether void, or whether in certain instances, such estates or interests, although not necessarily to vest within the period, may be supported, if they shall in fact vest within some limited period.

Proposals for improving the law; and first as to the limits of the rule of perpetuity.

Lives.

We have seen that the period of perpetuity, as the law now stands, embraces a life or lives in being, and some limited period of time beyond the duration of such lives.

Consideration whether the lives can be restricted to a given number.

1. As to the lives. We have fully considered what restrictions (if any) can be imposed as to the number or quality of the lives to be taken. There can be little doubt that in some of the cases we have adverted to, the number of lives has been arbitrarily adopted, with the view to lengthen the period of strict settlements; and this may be expected to be repeated as long as the law allows the assumption of an unlimited number of lives. Although it may be true, that a term for the lives of any number of persons is only a term for the one life of the survivor of them; yet, practically, the greater the number of the lives, the longer will be the duration of time. If it were desired to assume the life of a person who should live to the age of one-hundred, there would be a greater chance of finding such a person amongst twenty-eight lives (the number taken in *Bengough v. Edridge*) than amongst three. We have, therefore, paid anxious attention to a suggestion made from several quarters, that the number of lives to be taken in any case should be restricted to three, or some other small number, but we have found insuperable difficulties in the way of such a regulation. There is no observation more important to be borne in mind, than that parties dealing with their property should be allowed the utmost latitude which is not forbidden

See Appendix to First Report on Real Property.

by public policy. That rule, as applied to the present subject, would make it proper to allow the use of all such lives (to whatever number they might extend) as might be in any manner connected with the objects of the settlement, or the dropping of which might furnish the motives for any of its limitations. For instance, in settlements of large properties, subject to leases for lives, or to jointures, or estates by the curtesy, some of the limitations are often dependent on the dropping of the existing leases or incumbrances; in other cases, estates are intended to shift from one party to another on the dropping of the lives of third persons. In such cases, and many others that might be put, it would be difficult to fix upon any number of lives which should be sufficiently large to admit of every limitation being effectuated, to which it would in some instances be desirable to give effect, and which number (if adopted as a general rule) would not be too large to operate as any useful restriction: such a regulation would be also open to the objection of being arbitrary.

We next turned our attention to another criterion for restricting the number of lives; and considered a proposal, also suggested by persons whose opinions are entitled to weight, for limiting the lives to be allowed to those of persons *taking interests* in the settled property. But here we were met by fresh difficulties; for instance, that of determining what sort of interest it should be to admit of the life of the interested party being considered within the rule. It would be difficult to exclude any interest on the ground of its minuteness; and yet if there were no such limit, it would be easy to evade the law by creating unsubstantial interests. The conclusion to which we had come on the subject of contingent remainders, increased this difficulty, for, when we determined that contingent remainders ought not to fail by the destruction of the estates which supported them, but should be preserved, after the manner of executory limitations, until their vesting, it became necessary to provide that the law against perpetuities should not be thereby infringed, and then immediately arose the difficulty of determining, how the lives of persons taking estates prior to the contingent remainders could be brought within any practicable definition of the lives of parties interested. Again, the lives on which shifting limitations are to take effect, are frequently the lives of persons quite unconnected with the settled property. To meet such cases, therefore, it would be necessary to admit of some unconnected lives; and that brought

2. Whether they could be restrained to lives of parties taking interests.
See Appendix to First Report.

Modes in which the rule may be restricted as regards the lives.

back the difficulty of determining, to what number of such lives the indulgence should be extended.

Two modes have, however, occurred to us in which this rule of law may be conveniently and beneficially restricted as regards the lives. It may be declared, first, that the lives shall not be *arbitrarily* taken for the purpose of postponing the vesting of a future estate or interest; and, secondly, that lives shall not be made use of for the purpose of founding a term or period, within which to create future estates or interests, which (if limited to take effect out of an estate of inheritance) would be void as infringements of the rule against perpetuities.

The former of these regulations is calculated to prevent the recurrence of such cases as that upon Mr. *Thellusson's* will, and one of those abuses which occurred in the case of *Bengough v. Edridge*. Such a regulation would at all events dispose of cases in which the lives of the members of the Houses of Parliament, or of the boys of a public school, or any other fanciful class of lives might be assumed (an expedient which has sometimes been suggested as practicable within the present limits of the rule). This will also go far to effect the object desired by those who wish to limit the allowance to lives of parties interested; for whatever difficulty there may be in deciding who are parties sufficiently interested, there can be none in deciding what persons are entirely uninterested. However, as Courts of Justice might find it difficult in some cases to decide whether the lives were arbitrarily taken for the purpose of postponing the vesting of an estate, we think it ought to be declared, that all lives shall be deemed to be arbitrarily taken, unless the contrary shall appear in the instrument. As to all parties interested, and all those whose life or death may furnish the motive for a limitation, it will necessarily appear that they are not arbitrarily taken. In all other cases, it is fit that the motive and object (if any exists) should be made apparent.

The second regulation would prevent the recurrence of the other abuse which occurred in *Bengough v. Edridge*, and will also have the effect of ascertaining the application of the rule to settlements of property held on leases for lives. Such leases being ordinarily renewable, settlements of them are in truth not settlements of a limited interest; but in all cases, the lives existing in the lease, may, in some sense, be considered as arbitrarily taken to furnish a period, during which the rule of law may be substantially, although it is not formally transgressed.

The intent of this rule of law is to prevent the settlement of property under the doctrine of executory devise or shifting use, to a greater extent than it is practicable to carry it under the Common law doctrine of particular-estates and remainders, combined with the operation of the statute *de donis*, in creating estates-tail; but that again repressed and confined by the use of common recoveries. The effect of the rule is to create an analogy between the two subjects. But the system which has grown up with respect to entails has reference to the lives and minorities only of those who may be objects of the entail or settlement, and, therefore, it is only with reference to such lives that the analogy can exist; and it is plainly a misapplication of it to extend it to lives no otherwise connected with the settlement than as they happen to circumscribe the estate or interest which forms the subject of it.

The intent of the rule is to put settlements by executory use or devise on the same footing as settlements by entail.

2. As to the period of perpetuity, exclusive of lives. There can be no doubt that this period was at first adopted (as well in cases where the suspense was to embrace a life or lives also, as in those in which it was not), in order to allow for a minority; and that, being afterwards extended to meet the case of a posthumous child, it came to embrace the period of gestation, as well as that of infancy. The period, however, was ordinarily spoken of as a term of twenty-one years; and no practical inconvenience could be pointed out as resulting from the allowance of an absolute term. In cases where no lives occurred, (for instance, the case of a devise to take effect three years or ten years after the death of the testator,) it was early considered that the limitation would be good if the period of suspense did not exceed twenty-one years, which period must, in such cases, have been selected by analogy to the period of minority. The circumstance of its being so selected in these cases has appeared to us to furnish a strong argument in favor of admitting a gross term, in cases where it is to be taken in addition to a life or lives.

2. As to the period exclusive of lives.

It has been proposed to make the period in all cases twenty-two years, and to exclude times of infancy and gestation. This proposal has been made for the purpose of obviating doubts respecting the period of gestation; but very few of the cases in which such doubts occur have any reference to the period of perpetuity, and as the adoption of this proposal would, though in a small degree, enlarge the period of perpetuity (which we think it not desirable to do), we have thought it best to leave the limits of the rule

where we understand them to be now placed, as far as the law has yet been settled.

Proposed
definition of
the rule.

We, therefore, propose that it should be declared, that the period during which the vesting of a future estate or interest, may be suspended, must not exceed the life of a person, or of the survivor of several persons born, or *en ventre sa mère*, at the time of the creation of such future estate or interest, and ascertained for that purpose, by the instrument creating the same, and twenty-one years to be computed from the dropping of such life, or the minority of some person *en ventre sa mère* at the dropping of such life, and ascertained for that purpose by such instrument.

To this we propose to add other declarations, to the effect, first, That in the construction of the rule, the time of the death of the testator shall be deemed the time of the creation of an estate or interest created by a will, and the time of the execution of the instrument creating the power shall be deemed to be the time of the creation of an estate or interest created by the execution of a power, not tantamount to the absolute ownerships: secondly, That a limitation, to take effect on the determination of a life or lives, arbitrarily taken, for the purpose of postponing its vesting, shall be void; and that lives shall be deemed to be so taken, unless the contrary shall appear from the instrument: and, thirdly, That a limitation, which would be void if created out of an estate of inheritance, shall not be valid by reason of its being to take effect out of any less estate.

Consideration
of the question
whether limita-
tions tending
to perpetuity
should be void
in toto or
modelled. See
Appendix to
First Report.

*Leake v.
Robinson.*
2 Meriv.
368. v. p. 389.

The other branch of the rule against perpetuities, has been the subject of much discussion, and involves great difficulties. We have already stated that Courts of Justice do not model limitations, which are open to the objection of perpetuity, so as to render them valid to the extent of the rule, and void only as to the excess. But great judges have repeatedly observed, that this part of the rule might with less hardship have been differently settled: Sir *W. Grant* in particular expressed an opinion to that effect, in a case of frequent reference; and most of those whose opinions we have been able to collect on this subject, agree in thinking it advisable that this branch of the rule should be considerably modified. It is, no doubt, desirable to adopt that course which will bring the rule against perpetuities to operate with the fewest hardships, in individual cases. We have, therefore, inquired with great pains to what extent it is practicable and expedient that this part of it should be altered.

In some cases where the limits are exceeded, there is no difficulty in separating the excess, as in the case of a limitation to vest at the age of twenty-five, by making it vest at twenty-one. In some cases the separation is impossible, the limitation being in its nature such, that the excess cannot be precisely ascertained, as in the case of a limitation to the eldest son of an unborn child.

Principles upon which the excess may in certain cases be separated.

In other cases the excess may be separated in more than one mode, and the difficulty is to decide which ought to be adopted. Thus, a limitation after an estate for life, to an unborn child, to vest at the age of twenty-five, may be supported in either of two ways ; first, if the child should attain twenty-five in the lifetime of the tenant for life ; or, secondly, by cutting down the age for vesting to that of twenty-one. In such a case it would be impossible for any Court, without the aid of a legislative rule, to determine in which mode effect ought to be given to the limitation. It will, therefore, be necessary to specify the cases, and the mode in which effect is to be given to limitations exceeding in their terms the rule against perpetuities.

Upon examination, it will appear that there is a principle upon which this can be made. There are two sorts of remoteness, as the term is applied to the limitations of future estates: Remoteness, as it regards the event on which the limitation is to take effect ; and remoteness, as belonging to the objects in whose favor the limitation is to operate. A limitation, to take effect after a general failure of issue, is an example of the former ; a limitation to the son of an unborn son, of the latter.

Where both of these concur, as in a limitation after a general failure of issue to the son of an unborn person, it is of course impossible to support the limitation in part ; it must be wholly void. Where the event is within the proper limits, but the object of the gift or trust is unascertained, or where the event is too remote, but the gift or trust is in favor of an existing person, the limitation may be partially sustained.

A limitation after an estate for life to the son of an unborn son, is an instance of the former kind. A limitation in these terms, being a contingent remainder, would be allowed to vest, if a person answering the description were born during the continuance of the life-estate ; but in the case of a limitation to the son of an unborn person, after an estate for years determinable on a life in being, this, being an executory devise or springing use, would be absolutely void, and yet there is no substantial difference in the

two cases. The life-estate or prior estate can only operate in either case, by cutting off from an indefinite period a portion, during which the limitation may be allowed to vest. A limitation, after a general failure of issue, to an existing person for life only, (which is an instance of remoteness in the event, but not in the object,) is good, because the law presumes a failure during the life to be intended; but if the limitation is in fee, it is otherwise: and yet in this case, as in the former, the time of the life may be cut off from the indefinite period of which it is a part, and the excess be by that means separated. Upon the same principle, as children must come into existence during the lives of their parents, a gift to a class of children ascertained by reference to an existing person as their parent, though limited to take effect in an indefinite event, may be effectuated, if the event happen during the life of the parent.

• Proposal to allow the rule to be modified in certain cases.

We are of opinion that in the cases now specified, the rule against perpetuities may be modified; such cases may, for this purpose, be assimilated to contingent remainders, the time of suspense in each case not being greater than might be taken in limiting a contingent remainder to produce the same effect.

Executory or future limitations, to take effect in possession after estates-tail, may also be saved, in case they become vested at any time during the continuance of the estate-tail, or of any preceding estate or estates in tail. This depends on a simple principle, that as every estate-tail may be enlarged into a fee within a period which cannot exceed the limits, any limitation to take effect after an estate-tail cannot in substance have any tendency to a perpetuity. Estates or interests, operating in defeasance of an estate-tail, which may arise under the exercise of powers preceding the estate-tail, not being within this principle, must of course be good or bad, according to the construction which their own terms ought to bear, and cannot be made to depend on the estate-tail, which in truth follows them.

There are other cases in which the rule against perpetuities may conveniently admit of modification.

Limitations depending on the event of unborn children attaining an age greater than twenty-one.

Sometimes a limitation is made to depend on the event of unborn persons attaining or not attaining some age greater than twenty-one. In such cases, the testator or settlor may be reasonably presumed to have been in ignorance of the rule, and may be well understood as meaning either the legal age of majority or the latest age upon which he could legally fix, not exceeding that

specified. To give the required relief in such cases, we propose that the testator or settlor shall be deemed to intend the age of twenty-one.

Where a future estate is limited to take effect on the happening of both or either of two events, one of which is too remote and the other not so, there is reason to think it is wholly void ; for the rule requires that it should be absolutely certain that the estate should vest within the proper period ; and here, by the very terms of the limitation, that certainty does not exist. Thus, if an executory estate be limited to take effect, either in case A. shall die in the lifetime of B., or in case there shall be an indefinite failure of issue of C., the whole will be void ; although, if they had been made by distinct instruments, the former event, being within the limits, the estate might have taken effect upon the happening of that event. We think this case ought to be relieved ; and the best mode of effecting the relief will be, by declaring that a future estate or interest limited to vest on the happening of any one of several events, upon some or one of which only it might have been lawfully limited to vest, shall be deemed to be limited to vest upon such last-mentioned event, or some or one of such last-mentioned events only.

Limitations to take effect on two or more events, some of which are too remote.

A modification or relaxation of the rule may also be admitted in the case of an estate or interest to arise under a trust to be executed during successive minorities. At present, if a trust is created with reference to minorities generally, so that it may, in its fullest extent, be understood as referring to minorities in a third generation, it is considered void from the beginning.

Trusts to be executed during successive minorities.

This might be treated as a case of construction, and the limitation might be deemed to mean only such minorities as must be within the limits. But we have preferred treating it on a distinct principle. The second minority must always be the effect of accident, which cannot be prevented ; and there can be no harm done by allowing such a trust to be good, until some person in the line of succession attains the age of majority. The only purpose of such a trust, which is likely to occasion inconvenience, is that of accumulation, and that is regulated by the wholesome provisions of an existing statute. These it will be proper expressly to preserve.

Powers form one of the most difficult subjects of consideration, with reference to the rule. Powers.

We may first dismiss those cases in which the power is in fact a trust : they must be judged of by the rules applicable to trusts.

A power, strictly so called, can only be regarded as an authority to create a springing or shifting use or trust. If, therefore, it be limited to be exercised at a given time, or in a given event, or in favor of a given object, it can have no greater validity than a springing or shifting use limited by the same instrument, to take effect at the same time, or on the same event, or in favor of the same object. But if such a power is to be exercised at several specified times, or any of several specified times, or in favor of all or any of several specified objects, some of which may be within, and some without, the proper limits (in which case the want of certainty may be considered to render the whole void), there is no good reason why it should not be good, as to its exercise, at such of the times, or in favor of such of the objects contemplated, as may be within the proper limits, and void only as to any other exercise of it. Such a power may be regarded as, in effect, several powers.

But powers are in numerous cases expressed, without any limit as to the time of their exercise; and it has been much questioned how far such a power transgresses the rule. It appears to us expedient to settle this question by a declaration, that a power so made as that it may be exercised beyond the period allowed for the vesting of a future estate or interest, and not being tantamount to the absolute ownership of the land, shall be void, except in certain cases, which we shall presently mention. It is, of course, necessary to exclude cases where the power is tantamount to the absolute ownership.

Powers to be
exercised with
consent.

Where the exercise of a power, unlimited as to time, is to be controlled by the consent of the owner of the estate subject to it, great latitude may be allowed. The existence of an unnecessary power, in some cases, is the only inconvenience that can result from such an allowance. We think that such a power may be declared valid, and capable of being exercised in all cases. In cases where a power is to be exercised without consent, so far as a rule can be given for distinguishing a period during which it may be valid, from another in which it ought to be void, we think it ought to have partial effect given to it. Now this is the case, when the intention is that such a power shall be co-extensive with the limitations of a particular settlement, or will; and we are, therefore, of opinion, that in such a case the power (though consent be not required to its exercise) should be valid, and capable of being exercised, until some adult person shall become entitled in possession to an estate of inheritance under the settlement.

In defining the rule of law against perpetuities, we think it must be expressly made to comprise future estates and interests, to be created by Common law assurances, including rent-charges, rights of way, water, or light, and other easements, as well as all rights of entry, for breach of conditions, whether in relation to exchange, or to taking name and arms, or any other object, except conditions contained in leases, for re-entry by the lessor for non-payment of rent or breach of any lawful covenant; and in order that no difficulty may arise in distinguishing the cases to be protected by this exception, it must be declared that, with reference to contracts between landlord and tenant, the rule against perpetuities shall not apply to any rent, covenant, or proviso, unless it shall appear by the instrument, that such rent, covenant, or proviso, was reserved or inserted for the purpose of evading the rule.

The definition of the rule must comprise Common law interests;

except conditions as between landlord and tenant.

Easements are usually required for present purposes, and with reference to the present ownership of real property. They may be granted or limited in fee; in which case, like every other property, they will become liable to the rule of perpetuity; but if they are created to commence at a future time, or to cease on a future event, we think it ought to be required that such time or event must happen within the limits of the rule against perpetuities. The most remote occasion upon which such easements can be said usually either to arise or to cease, is upon the shifting of an estate under the provisions of a family-settlement; and as every such shifting must take place within the proper limits, no disappointment or inconvenience can happen in such a case. Any agreement requiring an allowance of time beyond this, may safely be concluded to be insincere and fraudulent, or frivolous; and to neither of these ought the law to be subservient.

We have seen that the rule of law against perpetuities applied in its origin to estates created by way of use, or by devise, and we have treated it (as in truth it is) as principally applicable to future contingent estates and interests; but a perpetuity may be effected without the existence of any contingent estate, by the creation of a long term of years, with a proviso for determining it on the happening of an event not within the limits of the rule; for in such a case, although the reversion expectant on the term is vested, and may remain vested, yet the acceleration of its taking effect in possession may produce the same effect as the limitation of a future contingent estate, and it is obvious, that by means of

The rule also to be extended to invalidate provisos for cesser of terms on remote events.

successive terms and successive provisoes of this kind, a settlement might be made, under which land would continue inalienable for a much longer period than the rule in question would permit. We are not aware of any case where interests of this kind, created by a Common law assurance, have been held invalid under the rule now under consideration ; but as the mischief in such a case must be the same as in the more ordinary cases of attempts to create perpetuities, we do not hesitate in recommending that such cases shall be brought within the operation of the rule, taking care to except the case of landlord and tenant, as already pointed out with reference to conditions and covenants. The difference between these and future limitations is, that here it must be declared, not that the future interest to arise on a remote event shall be void, but that the term made determinable on a remote event shall become absolute. It will, of course, be necessary to except estates-tail.

By the alterations we have now had the honour to propose to Your Majesty, the law relating to contingent remainders, and to future estates and interests, and to the intricate subject of perpetuities, will, as we trust, be relieved from many of the difficulties with which it is now beset ; and many of the anomalies which at present exist in regard to it will be removed. The destruction of contingent remainders, without the act of the parties claiming under them, will be rendered impossible ; the creation of future estates considerably facilitated ; and all estates and interests will be rendered alienable. The convenience of parties making settlements or testamentary dispositions of real estate will be consulted ; and at the same time the limits within which the settlement of property may be effected by means of future estates, or the operation of future provisoes or conditions, will be more accurately defined than they appear to have hitherto been, and rendered more uniform in their application to every description of estate, interest, or right, known to the law of England.

(Signed.)

JOHN CAMPBELL.	(L. S.)
W. H. TINNEY.	(L. S.)
LEWIS DUVAL.	(L. S.)
JOHN HODGSON.	(L. S.)
SAMUEL DUCKWORTH.	(L. S.)
P. B. BRODIE.	(L. S.)
JOHN TYRRELL.	(L. S.)

Extract from the *Propositions* of the Commissioners, made in pursuance of, and appended to, their third Report; embodying the declaratory and other enactments, recommended by them. (a)

8. The period during which the vesting of a future estate or interest in any hereditament, right, profit, or easement may be suspended must not exceed the life of a person, or of the survivor of several persons born or *en ventre sa mère* at the time of the creation of such future estate or interest, and ascertained for that purpose by the instrument creating the same, and twenty-one years to be computed from the dropping of such life, or the minority of some person *en ventre sa mère* at the dropping of such life, and ascertained for that purpose by such instrument; and every such future estate or interest which shall not be made to vest within such period shall (except as hereinafter is provided) be void.

9. In the construction of Proposition 8, the time of the death of the testator shall be deemed the time of the creation of an estate or interest created by a will, and the time of the execution of the instrument creating the power shall be deemed to be the time of the creation of an estate or interest created by the execution of a power not tantamount to the absolute ownership.

10. A remainder is not (b) to be deemed a future estate or interest within Proposition 8.

11. A contingent remainder or other future estate or interest, the vesting of which shall be suspended during a life or lives arbitrarily taken for the purpose of such suspension, shall be void; and lives shall be deemed to be arbitrarily taken for the purpose aforesaid, unless the contrary shall appear from the instrument creating such future estate or interest.

12. A contingent remainder, or other future estate or interest, which, if limited to take effect out of an estate in fee-simple, would be void under the rule against perpetuities, shall be void when limited to take effect out of any less estate.

13. A power so made that it may be exercised at any time beyond the period allowed for suspending the vesting of a future estate or interest, and not tantamount to the absolute ownership, shall (except as hereinafter provided) be void.

(a) See pp. 69—71.

(b) *Sed quæ? dele, "not."*

14. A future estate or interest limited to take effect in possession after the determination of any other estate or estates created at the same time, determinable upon a life or lives *in esse*, shall not be void if it vest at or before the dropping of such life or of the last of such lives.

15. A future estate or interest limited to take effect after the determination of any estate or estates tail, or in defeazance of any estate or estates tail (other than a future estate or interest arising under the exercise of a power having precedence to the estate-tail), shall not be void if it vest at any time during the continuance of any such estate-tail.

16. A future estate or interest, limited to any person or persons *in esse* at the creation thereof, shall not be void if it vest during the life of such person or any of such persons.

17. A future estate or interest limited to a class of persons described as children of some person or persons *in esse* at the creation thereof, and to vest in some event not connected with the age of such children, shall not be void if the event happen during the life of such parent or one of such parents, or before the birth of any such child, being a posthumous child.

18. A future estate or interest limited to vest on the happening of any one of several events, upon some or one of which only the same might have been lawfully limited to vest, shall be deemed to be limited to vest upon such last-mentioned event, or upon any of such last-mentioned events only.

19. Where a future estate or interest shall be limited to vest on the event of a person not born, nor *en ventre sa mère*, at the creation of such future estate or interest, attaining or not attaining an age greater than twenty-one, the settlor or testator shall be deemed to intend the age of twenty-one.

20. Where an estate or interest shall be made determinable either by the original limitation thereof, or by virtue of any proviso, condition, or agreement, upon the event of a person not born, nor *en ventre sa mère* at the creation of such future estate or interest, attaining or not attaining an age greater than twenty-one, the settlor or testator shall be deemed to intend the age of twenty-one.

21. An estate or interest limited or arising under a trust during the minorities of any persons being tenants in tail or in fee shall not be void by reason of the trust not being expressly confined to the minorities of persons taking by purchase; but every

such estate or interest (so far as it may be to arise during the successive minorities of any person, and the issue in tail or heirs of the same person,) shall cease so soon as such person, or his issue or heir inheriting, shall become adult; and nothing in this Proposition shall authorize or render valid any trust for accumulation beyond the limits within which such accumulation is by law restrained.

22. Where a power shall be limited to be exercised at several specified times, or any of several specified times, or on the happening of several specified events, or of any of several specified events, or in favour of several specified objects, or of any of several specified objects, at some or one of which times only, or on the happening of some or one of which events only, or in favor of some or one of which objects only, the same might lawfully be limited to be exercised, the same shall be deemed to have been limited to be exercised at such last-mentioned time, or some or one of such last-mentioned times only, or on the happening of such last-mentioned event, or some or one of such last-mentioned events only, or in favor of such last-mentioned object, or some or one of such last-mentioned objects only.

23. A power without restriction as to the time of its being exercised shall not be void if the same shall be limited to be exercised by or with the consent of the person or persons for the time being entitled to the land, but any such person or persons being tenant or tenants in fee or in tail may extinguish such power by deed or will.

24. A power over land subject to the limitations of a settlement made by the instrument creating the power, or by any prior instrument, and not limited to be exercised with the consent of the person or persons for the time being entitled to the land, may be exercised from time to time until some adult person shall become entitled in possession to an estate in fee or in tail under the settlement, and shall thereupon cease.

25. A power, the exercise of which may be enforced in equity in favour of persons whose estates or interests to be taken under the exercise of such power shall not be void under the foregoing Propositions, shall not be void.

26. The period during which an estate or interest in any hereditament, profit, or easement (other than an estate or interest in tail) may be made determinable, either under the original limitation thereof, or by virtue of any power, proviso, condition, or agreement, except as provided in Proposition 27, must not exceed

some period allowed for suspending the vesting of a future estate or interest, and every estate or interest in any hereditament, right, profit, or easement which shall be expressed to be made determinable either under the original limitation thereof, or by virtue of any power, proviso, condition, or agreement, at a time or upon an event not within some such period, shall be absolute.

27. With reference to contracts between landlord and tenant, Propositions 8 and 26 shall not affect any rent reserved by a lease, nor any covenant contained in a lease, nor any right of distress or entry for securing the payment of any such rent, or the performance of any such covenant, unless it shall appear by the instrument that such rent or covenant was reserved or inserted for the purpose of evading the law against perpetuities.

II.

Opinions upon the question, whether the word, "leaving," in a gift-over, following a limitation to children or issue, refers to the failure of the objects of the preceding gift at the death of the ancestor. (c)

E. M. devised a certain estate, to trustees, in trust for his daughter, C. C., for life, with remainder, to the children of C. C., as tenants in common in fee. There was a subsequent proviso, that, "in case his said daughter should happen to die without leaving any issue of her marriage, then, upon trust, after the decease of his said daughter," for the persons therein named.

What estates do the children of the daughter take under the above will?

Opinion.

The children clearly take vested estates as tenants in common in fee, subject, in my opinion, to be divested in the event of the death of *all* the children in their mother's lifetime. The word, "issue," means, "children," and does not refer to an indefinite failure of issue : see *Goodright v. Dunham*, Doug. 264, and *Malcolm v. Taylor*, 2 Russ. & My. 416 ; and there is no ground for holding, that mrs. C. takes an estate-tail by implication. The case of *Parr v. Swindells*, 4 Russ. 283, is distinguishable from the present, as there the children took estates for life only. Mr. O. has, therefore, I think, a good title to the shares he has purchased, subject to the contingency of the deaths of all the children in their mother's lifetime.

Lincoln's Inn,
March, 1841.

(c) Referred to, *supra*, p. 282.

T. P. by will bequeathed 1200*l.*, five per cent., navy stock, to trustees, upon trust, to receive the dividends and interest thereof, and pay such dividends and interest, from time to time as the same should become due, unto his (the testator's) daughter, E. M., for and during the term of her natural life, and which dividends should be paid to the said E. M., to and for her own sole and separate use and benefit, exclusive of her then present or any future husband, she might happen to marry, who should have nothing to do therewith, neither should the same be subject or liable to his debts, control, or management, it being his (the testator's) will and meaning, that the same should be for her own benefit only, and that her receipt alone, notwithstanding any coverture, should be a good discharge to his said trustees for the same; and from and immediately after the decease of his said daughter, E. M., then, in trust, to receive the dividends and interest of the before-mentioned sum of 1200*l.*, as the same should become due, from time to time, and pay the same interest and dividends, in equal parts, unto and between all and every the children and child of the said E. M., until they respectively attained the age of twenty-one years, and if but one such child, then the whole of the interest to such only child; and as they each and respectively attained the age of twenty-one years, then, in trust, to pay, distribute, and divide the said 1200*l.* unto and between all and every the children and child of the said E. M., equally between them, share and share alike; if but one such child, then, the whole to such only child, his or her executors, administrators, and assigns: and in case the said E. M. should happen to die without *leaving* issue, then, the interest of the said 1200*l.* should be paid unto his (the testator's) brother, J. P., during his life, and after his decease, to distribute and divide the same unto and between all and every the children and child of his brothers, J. P., A. P., and W. P., as should then be living, share and share alike, with the accumulating interest, as they respectively attained the age of twenty-one years, and to their executors, administrators, and assigns.

Several points arose on the construction of this bequest, among which was that noticed in the following

Opinion.

I think, that the words, "without leaving issue," must not be read as referring to an indefinite failure of the issue of Mrs. E. M., but, as contemplating only a failure of the objects of the prior

gift, viz., children. *Trickey v. Trickey*, 3 My. & K. 560. *Ellicombe v. Gompertz*, 3 My. & Cr. 127. *Leeming v. Sherratt*, reported in 6 Jurist, 663. And, in my opinion, the word, "leaving," must be understood, (the subject of the gift being personalty,) in its ordinary sense, as referring to a failure of issue at the death of mrs. M., and not in the sense of, "having had," (which latter construction would, of course, exclude the ulterior legatee, in the event of any child of mrs. M. being born, although living for ever so short a period): see the judgment in *Tarbut v. Tarbut*, stated 2 Jarm. Wills, 376: but I am bound to add, that it is open to be contended, that the words, "without leaving issue," are to be referred to the entire non-existence of the objects of the preceding gift; and that, therefore, mrs. M. having had one child, the property vested in it, on birth, and on its death, devolved to and is now claimable by its next of kin, or those who represent them; see 2 Jarm. Wills, 377, 378.

Lincoln's Inn,
January, 1843.

III.

Abstract of the settlement executed by order of the Court of Chancery in the case of Bankes v. Le Despencer. (a)

THE estates were vested in trustees, in fee, to the use of the present baroness Le D., for life, without impeachment of waste, then, to the trustees, in trust, to preserve contingent remainders, then, to the first and other sons of her body, according to seniority, and to the heirs of the body of such sons; and in default of such issue, then, to the daughters of the said baroness Le D., as tenants in common, and to the respective heirs of the body and bodies of such daughters, with cross-remainders between them; and in default of such issue, then, the estates were limited, in undivided fourth parts, to the four daughters of J. M. S., deceased, who was the second son of T., lord Le D. As to the three eldest of these daughters, who were born at the date of the executory settlement, three undivided fourth parts were limited to them respectively for life, with the like-remainders to their respective sons and daughters as were given to the sons and daughters of the baroness Le D.; but as to the fourth and youngest of such daughters, she having been born subsequently to the said executory settlement, the remaining one-fourth was limited to her and the heirs of her body: then followed a clause, limiting cross-remainders between those four daughters and their issue: and in default of issue of the daughters, then, the settlement proceeded to limit, *seriatim*, estates for life to those children and grandchildren of T., lord Le D., who were living at the date of the indenture creating the executory trusts, with remainders to their sons and daughters successively, in the same manner and upon the same principles as the limitations above-mentioned; and estates-tail to such of the grandchildren of the said T., lord Le D., as

(a) Referred to, *supra*, p. 579; and taken from the *Jurist*, vol. 7, p. 211.

were born subsequently to the executory settlement, or should yet be born. And upon failure of all such limitations, then, the estates were limited to the use of the trustees, their heirs and assigns, upon trust, to convey them to the same uses as the said estates were subject to, immediately before the said indenture creating the executory trusts. Then followed a proviso in these words, or to this effect:—
“ Provided always, and it is hereby agreed and declared, that, notwithstanding some of the limitations hereinbefore contained are made to several persons, as tenants in common, or applicable to undivided parts or shares of and in the said premises and hereditaments hereby settled, the object and intent of the settlement hereby made is, to limit the entirety of the same manors and hereditaments, as far as the law will permit, so as to accompany the dignity of Le D., as long as the person possessed of the same dignity shall be a lineal descendant of the said T., lord Le D., in pursuance of the direction in that behalf contained in the said recited indenture of appointment and release, of the 8th day of August, 1826, and the said limitations to tenants in common, or applicable to undivided parts or shares, are made upon the assumption, that, at the respective times at which the same are limited to take effect in possession, the said dignity will be in abeyance; and, therefore, in order the better to effect the said object and intent of this settlement, it is hereby further agreed and declared, that, in case, (but only during the lives of the several descendants of the said T., late lord Le D., to whom estates for their lives respectively are hereinbefore limited, and the life of the longest liver of the same descendants, and the term of twenty-one years, to be computed from the day next before the day of the decease of such longest liver,) at the time or respective times at which the said manors and hereditaments hereby settled shall, under the limitations of these presents, become vested in possession in any two or more such lineal descendants in undivided shares, the said dignity shall not be in abeyance, or, in case at any time or times during the limited period hereinbefore mentioned, and while, after the said manors and hereditaments shall have so become vested in possession in undivided shares as aforesaid, the said dignity shall be in abeyance, and such abeyance shall be determined by the prerogative of the crown, or otherwise, in favor of any one person being a lineal descendant of the said T., late lord Le D., then and in either of the said cases, and so often as the same shall happen during the limited period aforesaid, the several uses and limita-

tions hereinbefore limited and contained shall cease and determine, and the entirety of the said manors and hereditaments, with their appurtenants, shall thereupon become vested in the person in whom the said barony or dignity shall become vested, by the determination of such abeyance in her or his favor, or otherwise, for such and the like estate in possession, and with such and the like remainders and limitations-over, as the same manors and other hereditaments, or any part or other share thereof, are or is limited and assured to or would have become vested in her or him, under and by virtue of the limitations hereinbefore contained ; and if the case provided for as aforesaid shall, during the period aforesaid, happen more than once, then this provision shall be applicable and operate *toties quoties*."

Note.—A power, inserted in the settlement by the master, enabling the trustees, during the lives of the persons made tenants for life, or within twenty-one years afterwards, to alter the uses limited, under the authority and by the direction of the Court of Chancery, was rejected by the Court.

IV.

Extract from an opinion relative to a covenant against building, and a rent proposed to be granted to secure its performance. (e)

"The question, I apprehend, upon these covenants, is not so much a question of perpetuity, as it is one of inconvenience. But it is not easy to understand, what is the inconvenience to be dreaded. Inconvenience to the public is out of the question; and there can be no greater inconvenience to individuals, in allowing the fee-simple owner of land (who is owner, *ab imo usque ad cælum*,) to alienate, for a valuable consideration, the dominion of the light and air above the soil, than in allowing him to alienate the mines and minerals beneath. Nor can it be said, that the former are not objects, the enjoyment of which the law will recognize, for the existence of rights of way and light (which are often conferred by law, without any act of the parties,) sufficiently disproves that supposition. So that, to deny effect to such covenants would seem to be, to interfere with acknowledged rights of ownership; and, accordingly, they have been, in many cases, considered valid in Courts of equity, and if they are good in equity, it would seem to follow; that any legal remedy, title, or penalty, created for securing the performance of the covenant, would be good also."

"With regard to the last question put in this case, *viz.*, whether, if the grant of a defeazible rent be objectionable, the grant itself, or the proviso to suspend, would be void, I should have little hesitation in answering, that the whole would be void, for the Rule against Perpetuities is, that any grant or limitation shall be void, if it is not, in point of fact, certain, at the time of creating it, that it will attach within some defined period of a life in being and twenty-one years. If, therefore, the perpetuity-rule applied to the case at all, the whole must, I conceive, be void." "Probably, a rent-charge in fee, with a clause of defeazance, would be considered in equity in the light of a penalty, and might be relieved against, as such."

(Signed) JOHN HODGSON:

Lincoln's Inn.

(e) Referred to, *supra*, pp. 612, 613.

V.

Opinions relative to an Executory devise, engrafted on a devise to trustees in fee upon trusts for payment of debts. (f)

W. S., by his will, devised certain estates, unto his wife, N. S., and his uncle, J. S., their heirs and assigns for ever, upon trust, that they should, as soon as conveniently might be, sell and dispose of such parts as they should think proper, and as should be sufficient to pay and discharge all his just debts and funeral and other charges : and from and after a sufficient part of his (the testator's) said estates should be sold and disposed of, for the purposes aforesaid, he gave and devised all the rest and residue of his said estates, as well freehold as copyhold, and all his estate therein, unto his wife, the said N. S., for her life, and from and immediately after her decease, he gave and devised the same, to the heirs of her body by him (the testator), with divers remainders-over. N. S. survived her co-devisee in trust, J. S. A sale was effected of part of the property devised by the above-mentioned will, by persons claiming under the ulterior limitations therein contained. In the course of the investigation of the title, several opinions were written, from two of which the following are extracts. The first was given by the counsel for the purchaser ; and the other, by the vendor's counsel.

Opinions.

According to *Bagshaw v. Spencer*, 1 Ves. sr. 142, the legal fee-simple would be in the real representative of N., the widow and surviving devisee in trust of W. S. ; and the ulterior gifts would

(f) Referred to, *supra*, p. 638.

be trusts in equity, and not good *legal* executory devises ; inasmuch as it could not be predicated, within what life or lives in being and further term, a sufficient portion of the testator's estates would be sold, to pay his debts, &c.

Temple,
1839.

As the purchaser requires the heir of mrs. S. to convey, and I think it extremely doubtful how the point would be decided, I am of opinion, the heir should be made a party.

Lincoln's Inn,
September, 1841.

By a voluntary settlement, freehold property was conveyed to J. K. and W. N., and their heirs, (without the limitation of a use) upon trust, out of the rents, &c., to pay the settlor's debts, and the costs of preparing and executing the settlement ; and, subject thereto, various uses were limited in favor of the persons intended to be benefited by the settlement. Dealings with the property took place, in connexion with which, it became necessary to consider the question of the *quantum* of interest taken by J. K. and W. N. ; and the following is an extract of so much of an opinion, delivered by the counsel concerned, as relates to that point.

Opinion.

As this transaction proceeds upon the footing of the settlement, it becomes necessary to consider, whether the trustees will be necessary parties to any deed for effecting it. I alluded, in my former opinion, to the doubt which attaches to the question, as to the nature of the estate taken by the trustees under the settlement. In a will, under the old law, a trust for payment of debts, similar to that in question here, would create a mere *chattel* interest, determinable with the satisfaction of the purposes of the trust (that is, supposing they, otherwise, took no estate) ; al-

though this rule is now altered by statute, 1 Vict. c. 26. In the construction of a similar limitation in a *deed*, however, I am not aware, that any such rule ever prevailed (see 8 Co. Rep. 96). Nor do I think, that the trustees can be considered as taking a *fee*, subject to a *shifting use*, to arise on the satisfaction of the first trust, and divesting the fee in the trustees, in favor of the ulterior takers; the payment of a person's debts being indefinite, in point of time, and, therefore, objectionable, as too remote an event on which to limit a legal estate. The construction which recommends itself most to my mind, is that of the trustees taking a *fee*, and the ulterior limitations operating as *trusts*, to take place subject to the performance of the first trust. This necessitates the concurrence of the trustees in the proposed arrangement; and, even supposing there were not so much ground for the construction of the trustees taking a fee, as it seems to me there is, it would yet be advisable for the trustees to join in any conveyances, if merely, *ex abundanti cautela*.

Lincoln's Inn,
August, 1842.

VI.

Deed vesting Advowson in trustees in perpetuity, in the case of Attorney-General v. Cuming. (g)

By an indenture of bargain and sale, dated the 19th April, 1682, the advowson of the vicarage of Chudleigh was conveyed to the eight trustees therein named, to hold the same upon the trusts declared in an indenture of even date therewith. By the last-mentioned deed it was declared, that, from time to time and at all and every time and times for ever thereafter, whensoever and so often as the then present or any future vicar or incumbent of the vicarage of the parochial church of Chudleigh should happen to depart this life, or the said vicarage should become void, or want a vicar or incumbent, by death, resignation, deprivation, cession, or any other way or means whatsoever, then and in every such case, the said trustees, or the major part of them, and the survivors of them, and their succeeding trustees, and the survivors of them, or the major part of them for the time being, within the space of four calendar months next after such avoidance of the said vicarage, should and would publish and give notice and warning in the parish church or churchyard of Chudleigh aforesaid, upon two several Sundays, immediately after divine service, of a certain day or time for a meeting of the parishioners of the said parish of Chudleigh, at or in the parish-church there or church-house, or the market-house of the same parish, within the said four calendar months, for the electing and nominating of one fit, pious, and orthodox divine in orders, to be vicar and incumbent of the said vicarage; and that the said trustees, or the major part of them, and the survivors of them, and their succeeding trustees, and the survivors of them, or the major part of them, within the space of six calendar months next after such avoidance of the said vicarage, should, by writing under their hands and seals, present to the ordinary of the diocese for the time being,

(g) Referred to, *supra*, p. 705.

to be instituted and inducted to the said vicarage, such fit and orthodox divine in orders as the parishioners of the said parish of Chudleigh, whereof every one having an estate in possession of inheritance or freehold, or for any number of years above twenty years, absolute or determinable upon the death of any one, two, or three person or persons, of or in any messuages, lands, tenements, or hereditaments, lying and being within the town, borough, or parish of Chudleigh, which should be then rated or valued in and by rates made for the maintenance of the poor of the said parish of the yearly value of 5*l.* or upwards, or the major part of such parishioners, together with the trustees as aforesaid, or the major part of them, there assembling in or at the parish-church or church-house or market-house of Chudleigh aforesaid, within the said four calendar months next after such avoidance as aforesaid, and upon such notice and warning first given and published as aforesaid, should elect, nominate, and appoint; and that, in case such parishioners of the said parish for the time being, or the major part of them, should not, in such manner and at such time and place as was therein-before limited or appointed for such election and choice of such vicar and incumbent after such avoidance, make such election, nomination, choice, or appointment, then and in every such case, and in default, disagreement, or neglect thereof, it should and might be lawful to and for the said trustees, or the major part of them as aforesaid for the time being, to present to the said ordinary of the place or diocese for the time being, such orthodox divine as aforesaid, as the trustees for the time being, or the major part of them, by writing under their hands and seals, to be by them respectively sealed and subscribed in or at the parish-church or church-house, or market-house of Chudleigh, in or upon one of the four last days of the fifth calendar month next after such avoidance, should elect, nominate, and appoint to be vicar or incumbent of the said vicarage; and in default also of such election nomination, or appointment, or disagreement or equality of voices of the said trustees or the major part of them, then that any two or more of the trustees for the time being, whereof the eldest and most ancient in years to be one, should by writing under their hands and seals elect, and present such an orthodox person as aforesaid to the ordinary of the diocese for the time being, to be admitted, instituted, and inducted into the same vicarage: and it was thereby declared and agreed, that, when and so often as it

should happen, that any of the said then trustees, or any of the number of nine such persons as should from time to time thereafter be named made and appointed trustees for or concerning the premises, should be dead, or have relinquished or acquitted the said trusts, then in every such case, the said surviving trustees should and might, from time to time, and at all times, when and as often as they in their discretion should think fit, before the said trustees should by death or otherwise be abated or reduced to the number of five persons, or within three months next after the said trustees should by death, relinquishing the said trust, or otherwise, be lessened or reduced to the number of four persons, (and in case they should disagree or be equal in voices, then any two of them, whereof the eldest and most ancient in years to be one,) should grant, convey, and assure the said advowson, patronage, and premises, unto such other persons and parishioners of the said parish of Chudleigh, as such surviving trustees for the time being should in that behalf elect, nominate, and appoint; to hold to them and their heirs, to the use of such surviving trustees, and of such other persons so to be nominated and appointed for new trustees as aforesaid, and of their heirs and assigns for ever; whereby the number of nine trustees and no more might be again completed and made up, upon and under the several trusts therein before declared: to the end, the said advowson and premises might for ever thereafter remain and continue from trustees to trustees successively, and the said trust be executed, preserved, and performed, for the ends, intents, and purposes aforesaid, according to the purport, true intent, and meaning of those presents,

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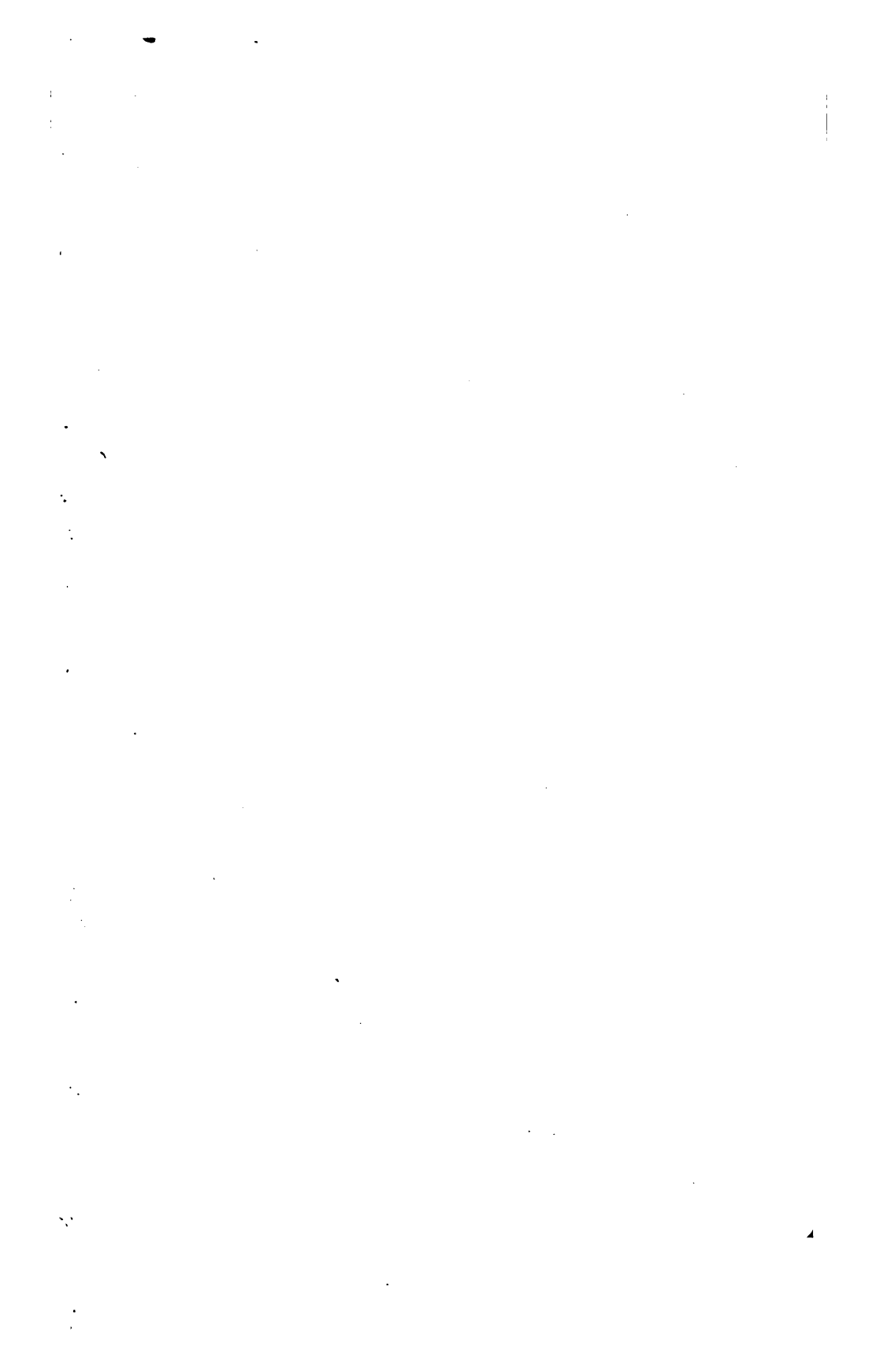
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